
IN THE
United States Circuit Court
of Appeals ³

FOR THE NINTH CIRCUIT.

No. 7876

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Appellant,

vs.

OLIVIA WAGNER, as Administratrix with the Will Annexed of
the Estate of Nick Wagner, Deceased,
Appellee.

BRIEF OF APPELLANT.

FREDERIC D. McCARTHY,
of St. Paul, Minnesota,

JOHNSTON, COLEMAN & JAMESON,
of Billings, Montana,

GUNN, RASCH & HALL,
of Helena, Montana,

Attorneys for Appellant.

FILED

JUL 14 1935

PAUL F. MONTIEN,
1935

INDEX.

	Page.
STATEMENT OF CASE	1
THE FACTS	2
THE ISSUES	5
DEFENDANT'S CONTENTIONS	6
SPECIFICATIONS OF ERROR	8
ARGUMENT AND AUTHORITIES:	
I. UNPRECEDENTED FLOOD	9
FAILURE TO ANTICIPATE AND GUARD AGAINST AN ACT OF GOD, CONSISTING OF AN UNPREC- EDENTED FLOOD, IS NOT NEGLIGENCE.....	9
THE FLOOD IN QUESTION WAS UNPRECEDENTED	10
HIGH WATER IN 1921	16
THE AMOUNT OF THE WATER AND METHOD OF DETERMINING IT	20
THE COUNTY BRIDGE BECAME BLOCKED, DAM- MING UP THE WATER AND CAUSING AN OVER- FLOW BEFORE THE WATER REACHED THE RAILROAD BRIDGE	24
THE FLOOD SWEEPED THROUGH THE TOWN AND ON TO PLAINTIFF'S PLACE OF BUSINESS BE- FORE IT REACHED THE RAILROAD BRIDGE...	24
THE RAILROAD EMBANKMENT WAS WASHED OUT SO AS TO CREATE ADDITIONAL WATER- WAYS	27
HISTORY AND DEVELOPMENT OF THE BRIDGE..	28
ACT OF GOD	30
II. NO EVIDENCE OF NEGLIGENCE	31
RESTORING THE STREAM AS NEAR AS MAY BE..	34

THE COUNTY HIGHWAY BRIDGE CONSTRUCTED IN 1907	38
THE INADEQUACY OF THE BRIDGE NOT PROVEN	40
III. NO EVIDENCE OF ACTIONABLE NEGLIGENCE	42
IV. PROXIMATE CAUSE AND CONCURRING NEGLIGENCE	48
V. DAMAGES NOT SEGREGATED	54
VI. PLAINTIFF'S CASE WAS BASED UPON OPINION OF WITNESS LYMAN. LYMAN'S TESTIMONY WAS IMPEACHED AND HE WAS SO COMPLETELY DISCREDITED THAT VERDICT CANNOT BE PERMIT- TED TO REST ON HIS TESTIMONY.....	62
VII. VERDICT CONTRARY TO LAW AS GIVEN BY COURT	67
VIII. REJECTION OF EVIDENCE	70
GOVERNMENT REPORT	70
IX. MISCELLANEOUS MATTERS	73
RECORD OF HIGH WATER IN 1900	73
OLD PHOTOGRAPHS	74
WATER UP TO THE STOCKYARDS	75
INTERVIEW WITH RAPELJE	76
ALLEGED LETTERS FROM TOWN COUNCIL OR CHAMBER OF COMMERCE	78
CONCLUSION	80

CITATIONS.

	Page.
Cases :	
Alt v. C. B. & Q. R. Co., 148 N. W. (Neb.) 900.....	31
American Bridge Co. v. Seeds, 144 Fed. 605 (8th Cir.)	52
Berlin Mills Co. v. Croteau, 88 Fed. 860.....	44
Black and White Taxicab and Transfer Company v. Brown and Yellow Taxicab and Transfer Company, 276 U. S. 518	46
Borchardt v. Wausau Boom Co., 11 N. W. (Wis.) 440	30
Boston, etc. Canal Co. v. Seaboard Trans. Co., 270 Fed. (1st Cir.) 525, Certiorari denied in 256 U. S. 692	41
Bray v. Cove Irr. Dist., 86 Mont. 562, 284 Pac. 539...	32, 44
Breitmayer v. United States, 249 Fed. 929.....	73
Brown v. Chicago, B. & Q. R. Co., 195 Fed. 1007.....	31, 60
Casey v. Northern Pacific Ry. Co., 60 Mont. 56, 198 Pac. 141	66
Central Trust Co. of New York v. Wabash, etc. R. Co., 57 Fed. 441	9, 30, 31, 32
Chesapeake & Delaware C. Co. v. United States, 240 Fed. (3rd Cir.) 903, affirmed in 250 U. S. 123.....	72
C. B. & Q. R. Co. v. Gelvin, 238 Fed. (8th Cir.) 14...	60
Chicago, etc. Ry. Co. v. Martin, 37 S. W. (2d) 207...	61
Chicago, etc. Ry. Co. v. Turner, 284 Pac. (Okla.) 855	10, 30, 31
Cleveland, etc. Ry. Co. v. Wisehart, 67 N. E. (Ind.) 993	45
Cohn v. United States, 258 Fed. (2d Cir.) 355.....	73
Cole v. German Savings & Loan Soc., 124 Fed. (8th Cir.) 113, 64 L. R. A. 416	49
Darnall v. Georgia, etc. Ry. Co., 68 S. E. (Ga.) 584..	60

Davis v. Schroeder, 291 Fed. (8th Cir.) 47.....	51
Diamond Match Co. v. New Haven, 13 Atl. (Conn.)	
409	30
Director General of Railroads v. Bryant's, 105 S. E.	
(Va.) 389	30
Eagan v. Central Vt. R. Co., 69 Atl. (Vt.) 732.....	30, 31
Eikland v. Casey, 290 Fed. (9th Cir.) 880.....	31, 32
Escallier v. Great Northern Ry., 46 Mont. 238, 127	
Pac. 458	77
Evanston v. Gunn, 99 U. S. 660, 25 L. Ed. 306.....	73
Fort Worth, etc. Ry. Co. v. Speer, 212 S. W. (Tex.)	
762	59
Fusselman v. Yellowstone Valley L. & I. Co., 53 Mont.	
254, 163 Pac. 473	45
Gaupin v. Murphy, 145 Atl. (Penn.) 123.....	52
Gleeson v. Virginia Midland R. Co., 140 U. S. 435....	9
Grand Trunk W. R. Co. v. Holstein, 67 Fed. (2d)	
(6th Cir.) 780	66
Greiner v. Alfred Struck Co., 171 S. W. (Ky.) 405...	30
Harris v. St. Louis, etc. R. Co., 27 S. W. (2d) (Mo.)	
1072 ..	10
Heckaman v. Northern Pacific Ry. Co., 93 Mont. 363,	
20 Pac. (2d) 258, at p. 263, par. 13, and cases there	
cited	9, 30, 38, 39, 42, 46, 47, 61, 73
Illinois Central Ry. Co. v. Oswald, 170 N. E. (Ill.)	
247 ..	52
Indianapolis, etc. R. Co. v. Horst, 93 U. S. 291, 23 L.	
Ed. 898	39
Inhabitants of Palmyra v. Woolen Mills, 58 Atl.	
(Me.) 674	30
Jeffers v. Montana Power Co., 68 Mont. 114, 217 Pac.	
652 ..	32

Johns-Manville v. Pocker, 26 Fed. (2d) 204.....	52
Johnson v. Mallory, 243 N. W. (Neb.) 872.....	52, 53
Jonosky v. Northern Pacific Ry. Co., 57 Mont. 63, 187 Pac. 1014	45
Kansas City, etc. R. Co. v. Smith, 17 So. (Miss.) 78..	30
Knowlton v. Chicago, etc. Ry. Co., 131 N. W. (Minn.) 858	60
Kolich v. Monongahela Ry. Co., 154 Atl. 705.....	21
Long v. United States, 59 Fed. (2d) (4th Cir.) 602..	73
Louisville & N. R. Co. v. Conn., 179 S. W. (Ky.) 195.	31
Lyon v. Chicago, etc. R. Co., 45 Mont. 33, 121 Pac. 886	10, 42
Meehan v. Forsyth, 65 U. S. 175 (6 C. C. A.).....	72
Memphis & Charleston R. R. Co. v. Reeves, 10 Wall. 176	9, 48
Mexican Central R. Co. v. Pinkney, 149 U. S. 194, 37 L. Ed. 699	39
Miller-Link L. Co. v. Stephenson, 265 S. W. (Tex.) 215	61
Norris v. Savannah, etc. Ry. Co., 1 So. (Fla.) 475...	30
Paris & G. N. Ry. Co. v. Stafford, 53 S. W. (2d) (Tex.) 1019	52
Pearce v. Newton, 41 Fed. 106	30
Peel v. Chicago, Milwaukee, etc. R. Co., 94 Mont. 334, 22 Pac. (2d) 617.....	9, 31, 42, 64
People v. Utica Cement Co., 22 Ill. App. 159.....	30
Penn. Railroad Co. v. Chamberlain, 288 U. S. 333...	66
Pittsburgh, etc. Ry. Co. v. Gilleland, 56 Penn. 445, 94 Am. Dec. 98	30
Potter v. Robinson, 40 N. J. Law 114.....	39
St. Louis & S. F. R. Co. v. Conarty, 238 U. S. 243, 59 L. Ed. 1291	47, 49
St. Louis, I. M. & S. R. Co. v. Insurance Co., 139 U. S. 223	48

Savings Bank v. Ward, 100 U. S. 195.....	43
Sawyer v. Southern California Gas Co., 274 Pac. (Cal.) 544	52
Sherwood v. St. Louis S. W. Ry. Co., 187 S. W. (Mo.) 260	10, 31
Simons v. Jennings, 46 Pac. (2d) 704 (Mont.).....	53
Southern Pac. Ry. v. City of Los Angeles, 26 Pac. (2d) (Cal.) 896	66
Staff v. Montana Petroleum Co., 88 Mont. 145, 291 Pac. 1042	52, 53
Stetson v. Stindt, 279 Fed. (3rd Cir.) 209.....	69
Stout v. Denver Park & Amusement Co., 287 Pac. (Colo.) 650	52
Tackaberry Co. v. Simmons Whse. Co., 152 N. W. (Ia.) 779	31
Texas, etc. Ry. v. Dunn, 17 S. W. (Tex.) 822.....	61
Texas Gulf Sulphur Co. v. Portland Gas L. Co., 57 Fed. (2d) 801 (1st Cir.)—Certiorari denied in 287 U. S. 601	53
United Press Ass'n. v. National Newspapers Ass'n., 254 Fed. (8th Cir.) 284.....	69
United States v. Percheman, 32 U. S. (7 Peters) 51, 8 L. Ed. 604.....	72
Velty v. Vulgamore, 24 Ohio C. C. 572, Affirmed, with- out opinion, in 67 N. E. (Ohio) 1103.....	30
Western Union Tel. Co. v. Totten, 141 Fed. 533.....	60

Statutes:

13 U. S. Stat. 365, Act of Congress, July 2, 1864— Sections 2 and 7.....	32
Revised Codes of Montana, 1921—— Section 6507, par. 4.....	31
Section 6507, par. 5.....	34, 39, 42
Section 8645	32

U. S. C. A., Title 5—	
Section 191	71
U. S. C. A., Title 28—	
Section 661	72
Miscellaneous:	
1 Cooley on Torts, (3rd Ed.), page 99.....	51
17 Corpus Juris, Section 90, page 758.....	59
45 Corpus Juris—	
Page 631	43
Page 647	43
Page 925, Section 488	52
Page 935, Section 494.....	52

IN THE
**United States Circuit Court
of Appeals**

FOR THE NINTH CIRCUIT.

No. 7876

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Appellant,

vs.

OLIVIA WAGNER, as Administratrix with the Will Annexed of
the Estate of Nick Wagner, Deceased,
Appellee.

BRIEF OF APPELLANT.

STATEMENT OF CASE.

In this brief, in referring to the parties to the action, we shall designate them as plaintiff and defendant instead of appellee and appellant.

The action was dismissed as to all defendants other than the Northern Pacific Railway Company (R. p. 46). This action was begun in the District Court of Wibaux County, Montana, and removed to the United States District Court on the ground of diversity of citizenship. A motion to remand was denied (R. pp. 9-29). By this action it was sought to recover \$15,000.00 alleged damages to the property of Nick Wagner, now

deceased, located in a store building in the south half of the town of Wibaux, Montana. The damage to the property was caused by flood waters from a creek flowing through the town, on June 7, 1929 (R. pp. 2-8). Plaintiff claimed that the damage in question was occasioned by the negligence of the defendant in failing to provide an adequate opening in its railroad embankment to permit the free flow of water in the creek and that the bridge provided by defendant was negligently constructed in that it failed to provide a sufficient opening to permit the passage of ordinary high waters in the creek. The defendant denied that it was in any way negligent and contended that the damage was caused by an unusual, extraordinary and unprecedented flood which could not have been reasonably anticipated by defendant (R. p. 35). The bridge in question had been in place for 31 years.

At the close of all the evidence, defendant moved for a directed verdict (R. p. 799), which motion was denied. A verdict was returned in favor of the plaintiff for \$5,000.00 (R. p. 821). A petition for a new trial was filed (R. pp. 825-830) and a new trial was denied (R. p. 837). Olivia Wagner, as Administratrix of the Estate of Nick Wagner, deceased, was substituted as plaintiff (R. p. 858), and petition for appeal from the judgment and order denying the petition for a new trial was filed and allowed (R. pp. 869-870).

THE FACTS.

Wibaux, Montana, is a city of approximately 600 in population, located in eastern Montana approximately 8 miles west of the North Dakota state boundary on the line of the Northern Pacific Railway Company. Wibaux is located in a hollow or valley with high ground on both sides of it. The railroad track is on an embankment which, in running through the town, di-

vides the same, the railroad being laid out at this point almost due east and west. What is ordinarily a small shallow creek which a man could step across in many places with not much more than a trickle of water in it (R. pp. 549 & 555), known as Beaver Creek, flows through the town. The creek rises in the south and flows to the north intersecting the railroad track and embankment at right angles. Beaver Creek rises in the vicinity of Ollie, Montana, approximately 40 miles south of the town of Wibaux (R. pp. 341 & 348). The creek has 17 tributaries (Ex. Y-13, R. p. 304). During a large part of a normal year these tributaries are so-called dry creeks, that is, no regular or steady flow of water takes place in them. The contour, course and character of the stream south of Wibaux for about 30 miles is similar to that at Wibaux (R. p. 279). The track is carried over the creek at Wibaux by means of a bridge. The country drained by Beaver Creek and its tributaries covers approximately 342 square miles.

On the night of June 6 and morning of June 7, 1929, a series of unusual storms took place throughout the Beaver Creek Valley (R. pp. 345, 350, 355, 363 & 397). The storms were in the form of so-called cloudbursts. As a result of these unusually heavy downpours of rain, the like of which never before occurred in the history of the valley, Beaver Creek and its tributaries overflowed their banks. The result was the forming of a large river which swept across country carrying away farmhouses, barns, granaries, and fences. Twelve or more county bridges were washed out. A great deal of stock and sheep was drowned. Property damage ran into many thousands of dollars. Practically every farm adjoining the creek for 30 miles south of the town of Wibaux and those farms located several miles north of Wibaux were damaged by the flood waters (R. pp. 343, 346, 354, 357, 365, 379, 384, 385, 391, 398-402).

The river formed by the flood reached the south half of the town of Wibaux sweeping away buildings, and a steel bridge (R. p. 61) located in the town. Some of the buildings were carried to and against the railroad embankment. Three people were drowned. This damage was accomplished by the flood water *before* the same reached the railroad embankment (R. pp. 101, 445-447, 512-514, 640, 724, 728, 738, 746-748 & 751). Defendant's engineers estimated the flow of water was more than 30,000 cubic feet per second at the time of the flood. The greatest known flow of water in the creek prior to the 1929 flood was approximately 10,000 cubic feet per second (R. pp. 330, 337, 663 & 790). The water washed out a considerable part of the railroad embankment. This washing out of the railroad embankment occurred prior to the peak of the flood (R. p. 641, 642). This resulted in the creation of waterways in addition to that afforded by defendant's bridge (R. pp. 56, 69, 149, 228, 507). According to plaintiff's own witness after the railroad embankment went out the water went down and then rose again (R. p. 63).

While it is not unusual for a cloudburst to occur in the area drained by Beaver Valley, this large number of cloudbursts occurring almost simultaneously was most unusual. These cloudbursts occurred not only in the vicinity of the creek proper, but on the tributaries of the creek. The result was that instead of the excess water caused by the cloudbursts being taken up by the stream in following its meandered course, the stream overflowed its banks, failed to follow the meandered course of the stream, and swept directly down the valley in the form of a swift flowing river, from a quarter to half a mile wide comparable to the Yellowstone or Missouri Rivers in flood time (R. pp. 351, 357, 401-403, 423, 521 & 524).

A large relief map about 8 feet by 9 feet square was introduced in evidence by the defendant, which is drawn to a scale of 50 feet equals 1 inch, vertically and horizontally (R. p. 309). This map shows the railway bridge, embankment, viaduct under the track at Main Street, county bridge, course of the stream, the buildings in Wibaux, and south thereof as far as Massey's place, the elevation of adjacent ground east and west, etc. (R. pp. 58, 308-309, 576-581 & 704).

For the convenience of the court, having in mind the size of the relief map, we have inserted in this brief a sketch of Wibaux, based on the relief map and testimony, giving some of the locations to enable the court to get some idea of the layout of the town.

THE ISSUES.

The complaint alleges that in June, 1921, and in other years, floods occurred, causing the water to rise within six inches as high on defendant's embankment as it did on June 7, 1929; that after each of said floods the town council and commercial club notified the defendant that the opening in said embankment was insufficient (R. p. 5); that the defendant negligently failed to provide an opening in the embankment sufficient to handle ordinary high waters in Beaver Creek, or, as stated in the complaint, "to permit the free flow of said water in a safe shallow sheet on the flood plane *in ordinary seasonally recurring high water*" (R. p. 6), and that by reason of such alleged negligence the property of plaintiff was flooded and damaged.

The defendant denied that it had failed to provide sufficient openings to handle ordinary high waters in said stream; denied that there were prior to June 7, 1929, other high waters rising to the height alleged in the complaint, and denied that it had been notified by the town council or commercial club

that the opening in said embankment was insufficient (R. p. 31).

As an affirmative defense, defendant alleged that its right of way where it crosses Beaver Creek Valley, was granted by the Act of Congress of July 2, 1864 (13 U. S. Stat. 365); that its road across such valley, where the town of Wibaux was established later, was constructed in 1881, and that the several bridges across Beaver Creek were constructed by defendant in conformity with the judgment, experience, and skill of highly qualified civil engineers; that several years prior to 1929 a county highway bridge of less capacity than the railroad bridge was constructed across the creek 600 feet south of the railway bridge (R. pp. 32-35); that the flood of June 7, 1929, was an unusual, extraordinary and unprecedented flood, which could not have been reasonably anticipated by defendant (R. p. 35). The plaintiff in his reply admitted defendant's allegations as to the manner of acquiring its right of way, the construction of the railroad in 1881, the construction of the highway bridge over Beaver Creek, but denied that the flood of June 7, 1929, was an extraordinary and unprecedented flood (R. p. 40).

DEFENDANT'S CONTENTIONS.

It is the contention of defendant and appellant that the verdict is wholly unsupported by the evidence for the reasons:

1. That the flood of June 7, 1929, was an unprecedented flood or act of God.
2. That the defendant, in the construction of its railroad, was not required to anticipate or guard against such an event.
3. That, according to all the evidence, the embankment and bridge of the Railway Company crossing Beaver Creek had never retarded or impounded the water of the creek to the extent that it ever affected the site on which was located the prop-

erty of the plaintiff and the property of the plaintiff would not have been damaged except for the unprecedented flood of June 7, 1929.

4. That as the railway embankment and bridge never obstructed the flow of the water of Beaver Creek to the extent of affecting the property of the plaintiff, and the property of the plaintiff would not have been damaged except for such unprecedented flood, the evidence wholly fails to show any actionable negligence or failure of the performance of duty by the defendant as to the property of the plaintiff which was damaged by the flood of 1929.

5. That as the evidence conclusively shows that the property of the plaintiff would not have been damaged except for such unprecedented flood or act of God, any negligence in the construction of the railway embankment and bridge, which may have resulted in damage to property adjacent to the stream situated at a lower elevation than the property of the plaintiff, was not the proximate cause of the damage to the property of the plaintiff.

6. That, according to all the evidence, the damage to the property of the plaintiff was occasioned, in part at least, by such unprecedented flood and there is no evidence by which the jury could have segregated the damage occasioned by the flood.

7. That there is no evidence of any negligence on the part of the defendant in the construction of the bridge crossing Beaver Creek or the embankment adjacent thereto.

The question of the sufficiency of the evidence is presented by the assignment of error in overruling defendant's motion for a directed verdict (R. p. 864), and the assignment of error in overruling defendant's petition for a new trial (R. p. 868).

It is further contended that the trial court erred in sustaining an objection to the introduction in evidence of defendant's

Exhibit D-12, which is a copy of a report of Army Engineers to the Department of War relating to the physical conditions and flood control at Wibaux, made after the flood of 1929 (R. pp. 322-324, 333 & 686).

The action of the trial court in sustaining this objection is assigned as error (R. p. 864).

SPECIFICATIONS OF ERROR.

1. The trial court erred in overruling defendant's motion for a directed verdict in its favor (R. p. 799).

2. The trial court erred in overruling and denying defendant's petition for a new trial (R. p. 825).

3. The trial court erred in sustaining the objection to the introduction in evidence of Defendant's Exhibit D-12 (R. pp. 322-324, 333 & 686).

ARGUMENT AND AUTHORITIES.

I.

UNPRECEDENTED FLOOD.

FAILURE TO ANTICIPATE AND GUARD AGAINST AN ACT OF GOD,
CONSISTING OF AN UNPRECEDENTED FLOOD, IS
NOT NEGLIGENCE.

If the flood of 1929 was unprecedented, the fact that the opening was insufficient and that the embankment impounded the water, whether it was ten inches, three feet, or six feet, does not make the defendant liable for damages caused thereby if it had provided an opening in the embankment sufficient to handle the *ordinary rains and flood waters* that might reasonably be expected. The defendant was not required to anticipate and guard against an act of God.

“A railroad company, acting in pursuance of legislative authority, is only required to exercise reasonable diligence and precaution in constructing passageways for the water through its bridges and embankments, and is entitled to select a safe and massive structure, in preference to a lighter one, which would less obstruct the water. It is not liable to an action for damages if it fails to construct a culvert or bridge so as to pass extraordinary floods.”
Central Trust Co. of New York v. Wabash, St. L. & P. Ry. Co., 57 Fed. 441, 446.

Heckaman v. N. P. Ry. Co., 93 Mont. 363, 20 Pac. (2d) 258, at page 263, paragraph 13, and cases there cited;

Peel v. Chicago, Milwaukee, etc. R. Co., 94 Mont. 334, 22 Pac. (2d) 617;

Memphis & Charleston R. Co. v. Reeves, 10 Wall. 176;
Gleeson v. Virginia Midland R. Co., 140 U. S. 435;

Chicago, etc. Ry. Co. v. Turner, 284 Pac. (Okla.) 855;
Sherwood v. St. Louis S. W. Ry. Co., 187 S. W. (Mo.)
 260;

Harris v. St. Louis, etc. R. Co., 27 S. W. (2d) (Mo.)
 1072;

Lyon v. Chicago, etc. R. Co., 45 Mont. 33, 121 Pac. 886.

THE FLOOD IN QUESTION WAS UNPRECEDENTED.

The flood of 1929 was far greater than any prior high water in Beaver Creek at Wibaux.

The melting of winter snow or heavy rains in May or June occasionally increases the flow until the creek overflows the first banks of the normal channel (R. p. 278), and covers the *low ground below* the level of the second bank or level on which the buildings of the town are located. Prior to 1929 the water never got over the second bank (R. pp. 250, 436, 694, 717-718).

Between 1881 and 1929, water during heavy rains got out of the first banks on various occasions and, according to the Railway Company's records, and the evidence herein, the highest water at Wibaux prior to 1929 was in 1893, 1897, and 1921 (R. pp. 585-588, 633-634, 691 & 712).

All witnesses on this point agree that the high water in 1921 was the highest at Wibaux prior to 1929 (R. pp. 298, 436, 442, 454, 461, 471, 482, 591 & 692).

In 1893 and 1897, the elevation of the high water was the same (R. p. 585). In 1893 it was 7.3 feet below the base of the rails on the bridge over Beaver Creek. In 1896, the track was raised 3½ feet. In 1897, the high water was 10.8 feet from the base of the rails, as raised in 1896 (R. p. 633). In 1898, the track was again raised 5 feet (R. p. 620), and the high water elevation in 1921 was 11 feet below the base of the rails as raised in 1898 (R. pp. 635 & 692).

So the water was 4.8 feet higher in 1921 than in 1893 or 1897.

The high water mark on the bridge in 1929 was 2.8 feet below the top of the ties, or base of the rail (R. p. 588), *so the high water mark of 1929 was 8.2 feet higher than in 1921*, when it was 11 feet below base of rails.

As shown hereafter, the 1929 flood reached an elevation of 2640 feet and was 5 feet above the elevation of Wibaux Street, where plaintiff's store stood, which street had an elevation of 2635 feet above sea level. The water coming down Beaver Creek in 1921, with the same railway bridge, embankment and viaduct at Main Street as existed in 1929, did not get high enough to run down Wibaux or Main Street, on which plaintiff's store was located (R. pp. 51, 73, 74, 84, 118, 155, 436, 694, 717 & 720).

No material damage was done to any property in Wibaux in 1921 by water from Beaver Creek (R. pp. 84, 454, 591, 655, 717 & 736).

The elevation of Wibaux Street above sea level at its intersection with First Avenue South, where plaintiff's store stood on the northeast corner, is 2635 feet (R. p. 559), and the elevation of Wibaux Street at the intersection of Orgain Avenue, just south of the railway embankment, is 2635.4 feet (R. p. 305).

The high water elevation above sea level at the railway bridge or embankment in 1921 was 2631.8 feet and at the same point in 1929 it was 2640 feet and 2640.1 feet in the plaintiff's store (R. pp. 326 & 560).

The elevations of the high water in 1893 and 1897, and in 1921 and 1929, at the railway bridge, are shown by wires placed on the bridge models, introduced in evidence, and by photostatic copy of the bridge records (Exhibits D-23 and D-24) (R. p. 575).

The evidence is undisputed that the maximum flow of water in 1921 was 10,000 cubic feet per second or 75,000 gallons of water passed a given point per second. In 1929, according to defendant's engineers and the Army engineers (see Exhibit D-12), more than 30,000 cubic feet of water or more than 225,000 gallons of water passed a given point per second. In other words, the *1929 flood was three times as great as the 1921 high water*. The method of determining the number of cubic feet per second passing a given point, and the testimony which established conclusively that the 1929 flood was more than three times greater than any known prior water are set forth at p. 20 of this brief.

In 1929, a series of cloudbursts occurring at different points on Beaver Creek and its tributaries south of Wibaux (R. pp. 345, 350, 355, 363 & 397) combined to produce the extraordinary flood of June 7, 1929. This flood washed away embankments, buildings, granaries, trees, miles of fences, numerous highway bridges, heavy farming machinery, and drowned many head of stock all along Beaver Creek for a distance of about thirty miles south of Wibaux and at various points where the physical conditions were very similar to those at Wibaux, showing that the railway bridge and embankment had nothing to do therewith. See testimony of various farmers living along the creek south of Wibaux (R. pp. 343, 346, 354, 357, 365, 379, 384, 385, 391, 398-402).

The 1929 flood also washed away several buildings and the steel highway bridge in Wibaux, carrying them down or north towards the railway embankment. The movement of the water coming down the creek and valley in large waves as it approached and hit the town is well described by Edith Jones, twenty-two years of age. Her testimony, in substance, was as follows:

That in June, 1929 she was living two and a half miles south of Wibaux and about half a mile to the east of Beaver Creek, and had lived there 17 years; that it stormed during the night of June 6 and morning of June 7, 1929; that shortly after daylight and between 3:00 and 3:30 a. m. she observed water over the grade connecting the high grounds on which their barn and house were located; that the water *at that time* was not as high as in 1921 (R. p. 461 & 482); that she secured her saddle horse and rode to the south until she reached a high creek bank. From the bank she observed the water rising in the creek. While watching the water rising she heard a muffled roar; "almost like thunder" and looking to the south saw a bank or low wall of water "boiling up—rolling up" and coming from south toward the north. That the water spread out to a width of about a quarter of a mile. The wave appeared to be about $3\frac{1}{2}$ feet high; a second wave moving more swiftly than the first one followed the first one; and the second wave was followed by several smaller ones. That after a short while she rode rapidly north toward Wibaux; and that on reaching the north bank of the creek the wave of water was still to the south of her. She again rode for the town of Wibaux. At times her horse was running, and at other times the horse had to struggle to get through water. That upon reaching the town of Wibaux she proceeded down a street in the Davis Addition just east of the creek until she got as close as possible to the county bridge that crossed the creek in town. She remained in that general location some time. After arriving in town she saw a large wave of water come past the Massey (Tom Rush) place—a large share of the water going to the north past the city water tower and into and through the town; she saw the yellow house floating north in the water; saw the Methodist parsonage floating from west to east past the blacksmith shop until it got in the main channel; saw it move to the north; saw the water rise until it covered an automobile which was standing near the Miller (green) house; saw a shed located near the Miller house washed

away; saw the water go to the west of the Miller house and to the west of the Kinney house. The water in a large volume poured into town about 6:30 a. m. She saw people in the Davis Addition move in a southerly direction on to ground that is higher than that of the Davis Addition. That water came down from Possum Hollow, running to the north. That the water she saw in the Davis Addition was all moving toward the north (R. pp. 460-494).

That the water came down in a large wave or wall of water, hit the south end of town and rushed on through the town, washing away the buildings described by Miss Jones and also washing away the heavy steel county highway bridge (R. p. 61), was also observed and testified to by the following witnesses, then in Wibaux, to-wit: Drake (R. p. 101), Mrs. Edighoffer (R. pp. 445-447), Paulsen (R. pp. 512-514), Zinda (R. p. 640), Jobe (R. p. 724), Kimball (R. p. 728), Woodard (R. p. 738), Mrs. Hayes (R. pp. 746-748), and Rowe (R. p. 751).

The newspaper published by Charles W. White, a plaintiff in a similar action, in Wibaux on June 13, 1929 (Defendant's Exhibit "C", introduced in evidence), in describing the flood, refers to this wall of water in Wibaux at that time (R. p. 113).

A wall of water, estimated at from 4 to 6 feet high, coming down the valley towards Wibaux was also seen by a number of the farmers, to-wit: Lund (R. p. 357), Efta (R. p. 371), Miesoloski (R. pp. 398-402), Burke (R. pp. 419 & 420).

There is no evidence that other high waters in said stream prior to 1929 ever did any material damage, either in the town or south along the stream. In fact, it appears that there was no damage from such other high waters (R. pp. 73, 84, 454, 591, 655, 717 & 736).

Every witness interrogated on this point testified that the 1929 flood in Beaver Creek at Wibaux was the greatest in the history of the stream.

Tom Rush has lived near Wibaux since 1884 (R. p. 433), and until 1924 owned the ranch now known as the Massey Ranch (R. p. 141). The Massey ranch is located about 2250 feet south of the town, and shown on the relief map at the south side thereof. Rush had a cow shed built on the bank of the stream south of his buildings, with its top about level with the top of the bank (R. p. 556). He testified that prior to 1929 water never got up into his cow shed or high enough to run along the highway east of his buildings (R. p. 435). See also, Massey's testimony (R. p. 143). In 1929, the water got up to the top of this cow barn (R. p. 143), and also ran over the bank and along the highway east of the Massey house about 11½ feet deep (R. pp. 145-146). Defendant's Exhibit D-17, introduced in evidence, shows in color the low water mark and the high water mark at Masseys and also the height of the top of this cow shed and of its floor (R. p. 558). The difference between the low water mark and the high water mark as shown by this exhibit is 14.2 feet.

John Brophy, who has lived on the bank of Beaver Creek about 5½ miles south of Wibaux since 1882 (R. p. 388), testified:

“There was no comparison whatever between this storm of June 6 and 7, 1929, and with any high water that I had ever seen at my place before.” (R. p. 392).

Dan Sutherland, a witness for the plaintiff, who has lived in Wibaux since 1901 (R. p. 154), and who is a plaintiff in a similar suit against the defendant to recover damages on account of this 1929 flood (R. p. 165), testified:

“It looked like a great wide river there; there was a lot of water there; and this water was flowing from the south towards the north, and towards Wibaux,—it always flows that way. This 1929 high water was beyond anything I

had ever seen in the way of a flood there in Wibaux in 33 years." (R. p. 167).

The following witnesses along said stream, who have lived in said valley from 18 to 25 years, also testified to the same effect, to-wit: Bryson, R. p. 343; Stark, R. p. 346; Moline, R. p. 352; Lund, R. p. 357; Shea, R. p. 365; Holstein, R. p. 378; Linn, R. p. 387; Miesoloski, R. p. 403; Edith Jones, R. pp. 461-464 & 471; Paulsen, R. pp. 512-514.

No witness testified to the contrary.

Two witnesses testified for the plaintiff, in rebuttal, as to local cloudbursts, and an ice gorge some 25-30 miles south of Wibaux, occurring in the years 1904, 1907, 1909, and 1925, and that, in their opinion, the rain was as heavy or heavier on some of these occasions than it was at their respective places in 1929. (See testimony of Dennis, R. pp. 752-759 and Nelson, R. pp. 760-763). There is nothing in their testimony to show that the water from these local storms, so far away, ever reached Wibaux in sufficient quantity to attract any notice there. In fact, their evidence clearly indicates that it did not. Mr. Bushell was at his ranch, 25 miles south of Wibaux in 1907, and observed the cloudburst that year in that vicinity, and the next day drove back to Wibaux. He testified that there was no evidence of high water at Wibaux from this cloudburst at his ranch (R. pp. 716-717).

HIGH WATER IN 1921.

Plaintiff attempted to show that more of the town of Wibaux was flooded in 1921 than in 1929, but the evidence shows that the heavy rain in 1921 fell right in the town and immediately west and east thereof (R. pp. 73 & 133). There is high ground just west of the town, known as Cemetery Hill, and at the base of this hill along the west side of town is a swale or depression

slightly lower than the elevation of Main Street. Also on the east side of town—east of the Davis Addition,—there is high ground, drained by “Possum Hollow”, which conveys the water into and through Davis Addition. These physical conditions are clearly shown on the large relief map introduced in evidence.

With a heavy rain in town and adjacent thereto, the water from Cemetery Hill flows down into town before it reaches the creek, and on the east side it would run down Possum Hollow and through the Davis Addition before reaching the creek. See testimony of Pickering (R. p. 59), Barclay (R. pp. 133-135), Lehin (R. p. 263).

Bushell testified:

“I was in Wibaux in 1921. I heard the testimony as to the 1921 flood. Describing briefly the extent of the storm and any high water in Wibaux in 1921,—the 1921 flood came mostly from the east and southeast. On the east side of the Davis Addition there was quite a lot of water; that is what has been described as Possum Hollow (you are pointing to it); there was quite a lot of water over on that side clear down to the industrial track of the railroad, and some parts of that were washed out. By ‘industrial track’ I mean where the elevators are. As to the extent of the water in the town of Wibaux, well there was a small stream ran to the west along the right-of-way and turned at the lumber yard and went down under the viaduct. There was no water at all on Main Street or Wibaux Street. As to whether there was any water at all in that part of town west of Wibaux or Main Street, there was only this little stream that ran down along to the viaduct—that little stream that ran down along the railroad track and to the viaduct.” (R. pp. 717-718).

There was no water on Wibaux or Main Street in 1921, except at the extreme southern end near the creek which is sev-

eral feet lower (R. pp. 305-306) than where plaintiff's store stood. (See testimony of O'Keefe, R. p. 73; Sherman, R. p. 84; Drake, R. p. 98; Rife, R. p. 118, and Sutherland, R. p. 155, all witnesses for plaintiff).

Mr. Blum, Chief Engineer of the Railway Company, was in Wibaux in 1921 immediately following the high water of that year. He testified that there was no water over the streets or around the buildings in Wibaux proper.

First and Second Avenues South, as shown by the relief map, are on a higher level than the swale or depression west of town, so that water coming from Cemetery Hill in 1921 would, to a certain extent, be diverted by the raised ground of First and Second Avenues to the east and across the southern part of the town and into the creek near where Drake's barn stood and the balance would flow north along the swale to the railway embankment and then east along the low ground on the railway right of way to the viaduct and from there into the creek.

In a further attempt to show more water in Wibaux in 1921 than in 1929, Mrs. O'Keefe, a witness for the plaintiff, testified there was more water in the Davis Addition in 1921 than in 1929, and she pointed out to plaintiff's engineer Lyman the high water marks in 1921 in the Yuell house and in her house, both in the Davis Addition (R. pp. 73-79).

The admitted elevation of the front of the Yuell house and of the O'Keefe house is 2642.7 and 2640.7 feet respectively (R. p. 307).

As the undisputed evidence shows that the water in 1921 did not get onto Wibaux Street, with an elevation of 2635 feet, it is manifest that the water in the houses in 1921, referred to by Mrs. O'Keefe, could not be water from Beaver Creek, for if it had been the water would necessarily have been at least 5.7 feet deep on Wibaux Street in 1921.

The capacity of the railway bridge had nothing whatever to do with the water coming down Cemetery Hill and running through the town and coming down from Possum Hollow and flowing through the Davis Addition before it ever reached Beaver Creek where it could be carried away through the bridge.

Plaintiff also introduced, over objection of the defendant, evidence showing that the railway embankment was softened during the heavy rain at Wibaux and east thereof in 1921, and a locomotive of the defendant tipped over about three or four thousand feet east of the railway bridge and the track washed out at some points east thereof (R. pp. 85-87). This evidence was also being offered on the theory that the 1921 high water was such as to notify the defendant that its bridge was insufficient to properly handle the water in Beaver Creek. East of the town of Wibaux and particularly east of the railroad bridge there is high ground. The area to the east of this high ground is drained by a gulch, water from which empties into Beaver Creek north of the railway embankment. A culvert carries this gulch through the railway embankment or grade. The conditions in this gulch and surrounding the culvert have nothing whatever to do with the situation at the railroad bridge or the creek at the railroad bridge or to the south thereof. It may well be that the culvert was too small to carry the water that was brought to it by the gulch through the embankment. Assuming that the culvert, 4000 feet east of the bridge, carrying water from an entirely different drainage area, was too small, this fact, if it is a fact, would have no bearing whatever on the question of whether the bridge over Beaver Creek was adequate or not.

Mr. Paulson lived near the city water tank; no water got into his house in 1921. It did in 1929 (R. p. 512).

THE AMOUNT OF THE WATER AND METHOD OF DETERMINING IT.

The number of cubic feet of water per second passing a given place is determined by ascertaining the area of a cross section of the high water and multiplying it by the velocity of the water in feet per second (R. pp. 311, 312, 650). For example, if the water was flowing 6 miles per hour the water would flow ($1\frac{1}{2}$ times miles per hour gives feet per second, R. p. 301) 9 feet in a second. So if we assume an area of a cross section to contain 5,000 square feet, and that the water was flowing 6 miles per hour or 9 feet in a second, we would multiply 5,000 by 9. The result, 45,000, would be the cubic feet of water passing through a given cross section in a second. This is an accepted engineering fact. Both the engineer who testified for the plaintiff and the engineer who testified for the defendant were in agreement as to this being the proper method of determining the number of cubic feet of water per second (R. pp. 311, 312, 650, 790). Plaintiff's engineer, Mr. Lyman, used as a basis for his calculations a cross section made at a location west of the Massey place. The area of this cross section as computed by Lyman was 3774 square feet (R. p. 314). He estimated the velocity of the water as being 4.19 feet per second, or approximately 2.8 miles per hour (R. p. 312). This area did not include any water that flowed east of the Massey house. There was considerable swiftly flowing water east of the Massey house (R. p. 145). Multiplying the area, 3774 square feet, by the velocity he had determined, 4.19, Lyman secured a result of 15,800 (R. p. 314). This Mr. Lyman figured as the flow passed Massey's house. Instead of using 15,800 cubic feet of water per second, he thereafter referred to the result of his computations in round numbers as approximately 16,000 (R. p. 301).

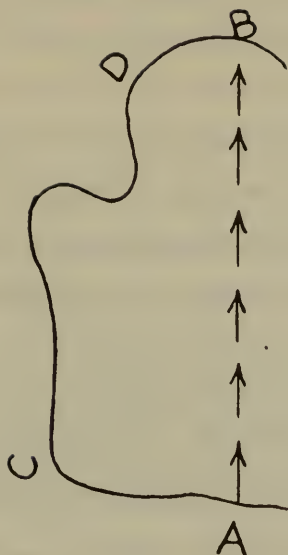
If the engineers agree as to the method of computation, as they did in this case, how then could one get a result of 16,000 cubic feet per second and the other more than 30,000 cubic feet of water per second, as did defendant's engineer (R. p. 649). The answer is, of course, a different velocity was used by the different engineers. What was correct?

Mr. Lyman, plaintiff's engineer, ascertained the velocity he used by computations based on engineering formulae exclusively (R. pp. 314, 313). He conceded that an engineer should not use formulae "if he has other data" (R. p. 289). In this case other data was available to Mr. Lyman. Mr. Massey, a witness for the plaintiff, observed debris being carried in the water and past his place that was moving "quite fast. I would think it would be going faster than a man would ordinarily walk" (R. p. 413). Notwithstanding his statement about the use of other data, Lyman said: "In arriving at my computations I am absolutely ignoring Mr. Massey's testimony" (R. p. 313).

The court will take judicial notice of the fact that a man ordinarily walks at a rate better than 3 miles per hour. *Kovich v. Monongahela Ry. Co.* (Penn.), 154 Atl. 705, 706. So that when Mr. Massey said the water was moving "quite fast, *faster* than a man would ordinarily walk" he made it clear that the water was moving *faster* than 4 miles per hour. In addition Jean Weber, a witness for the plaintiff, saw the Methodist parsonage floating. She testified the parsonage was moving at a rate of from 4 to 5 miles per hour (R. p. 69). If we average the testimony, taking the most favorable view possible from the plaintiff's standpoint of this testimony, it is clear that the water was flowing at least as fast as $4\frac{1}{2}$ miles per hour, or 6.7 feet per second. Multiplying 3774 square feet, the area of the cross section, by 6.7 the velocity of the water, we

get a result of 25,286. So it is clear that on Lyman's own theory more than 25,000 cubic feet of water per second flowed west of Massey's place, to say nothing of the water that flowed east of the Massey house.

At another time Mr. Lyman testified that the velocity of the water at Massey's place was 8 miles per hour. Eight miles an hour is 12 feet per second. $3774 \times 12 = 45,288$ (R. p. 318). If the engineering formulae are used correctly, a similar result will be obtained. Mr. Lyman testified that he determined the velocity by using the Chezy and Kutter formulae. That to use these formulae it is necessary for the person using the same to determine the slope of the water. In ascertaining the slope Lyman said "I used the meandering distance. By meandering distance I mean the distance around that the stream ordinarily—the depth of the channel of the stream" (R. p. 317). Mr. Massey, plaintiff's own witness, testified that on the day of the flood the stream was not following its ordinary course, but was flowing in a line from his place to a point about half way between the city water tank and the Miller house. By looking at the exhibit, the relief map, or a glance at the sketch inserted in this brief, the court will see that Lyman brought about a distorted result by getting his slope from the meandered ordinary course of the creek instead of using the course that the stream was following at the time of the flood. To illustrate, instead of getting his slope by taking the line of the water A B, Lyman used the line A C D B. The greater distance of line A C D B over line A B obviously gave a different factor and enabled Lyman to compute a lower result.



Mr. Lillis testified that the proper method of determining the slope was to measure the surface of the water at two different points. This was obviously correct because then holes or unusual conditions in the bottom of the creek would not distort the results (R. pp. 650, 651). Mr. Lyman used the bottom of the creek (R. p. 315), thereby further distorting the result.

Assuming for the sake of argument that plaintiff's expert Lyman was correct and that the maximum flow of water in 1929 was 16,000 cubic feet of water per second, the flood of 1929 nevertheless was an unprecedented one that defendant could not in the exercise of ordinary care be expected to guard against. The highest known water prior to 1929 was in 1921 when the maximum flow was 10,000 cubic feet of water per second. So if we accept Lyman's figures the 1929 water was 6,000 cubic feet of water per second or 45,000 gallons of water per second greater than any known prior water. The difference between 10,000 and 16,000—6,000—is 60% of 10,000. So if we assume Lyman's altered testimony to be correct the 1929 flood was 60% greater than any previously known high water. We submit a flood 60% greater than any previously known

high water constituted an unprecedented flood that defendant could not in the exercise of ordinary care be expected to guard against.

The impeachment of Lyman, by his own testimony given on another occasion where he admitted that the flow of water in 1929 was more than 30,000 cubic feet per second, is set forth later in this brief commencing at page 62.

THE COUNTY BRIDGE BECAME BLOCKED DAMMING UP THE WATER
AND CAUSING AN OVERFLOW BEFORE THE WATER REACHED
THE RAILROAD BRIDGE.

Before the water flowing in the stream would reach the railroad bridge it would first reach the county highway bridge on First Avenue South. According to plaintiff's expert this county bridge had an opening of only 920 square feet (R. p. 280). The railroad bridge had an opening of 1190 square feet, according to Lyman, and 1320 square feet, according to Clements (R. pp. 311, 591). The opening of the county bridge was blocked so that little water was passing through it. Trees, boards, trash, chicken coops and all kinds of small buildings lodged against the county bridge closing the bridge opening (R. pp. 445, 446). Inasmuch as the water reached the county bridge before it reached the railroad bridge the overflow would take place *before* the water ever reached the railroad bridge.

THE FLOOD SWEPT THROUGH THE TOWN AND ON TO PLAINTIFF'S
PLACE OF BUSINESS BEFORE IT REACHED THE
RAILROAD BRIDGE

Both Mr. Lyman, plaintiff's engineering witness, and Mr. Massey, a witness for the plaintiff, conceded that west of the Massey house (3700 feet south of the railroad embankment) the flood water extended at least 600 feet in width

(R. pp. 313, 145). At this place the water was $14\frac{1}{2}$ feet deep (R. pp. 307, 313). Mr. Massey testified that this water moved straight across the low land and that the direction of the flow of the water was about half way between the city water tank and the Miller or so-called "green house" (R. p. 142). Obviously water 600 feet in width and $14\frac{1}{2}$ feet in depth rushing from the Massey place directly on to the town of Wibaux would flood the town unless something stopped it. A glance at the relief map shows there was nothing to stop this water, and that a converging of the water similar to that at Masseys would necessarily follow. The water would necessarily sweep into the town. The creek bank between the city water tank and the Miller house was only 7 feet high. The water, which was 600 feet in width and $14\frac{1}{2}$ feet deep at Massey's was on the same plane as the *top* of the bank of the creek near the town. Just how much water the depression consisting of the creek bed would divert is, of course, problematical, but it would certainly follow that a great amount of that water would rush into the town. As Mr. Lillis, defendant's engineering expert, put it, there was nothing else the water could do but rush into the town (R. p. 652). Plaintiff's expert, Mr. Lyman, admitted that some of this water would enter the town at the swale located near the city water tank (R. p. 134). The city water tank and the Miller house referred to being approximately 1300 feet south of the railroad embankment, and plaintiff's store being approximately 600 feet south of the railroad embankment, it follows that the water flooded the town and plaintiff's store before it ever reached the railroad embankment.

Mr. Zinda lived on the south edge of town about half way between the city water tank and the Miller house. On the morning of the day of the flood he saw water coming from the

south moving north around his house. The water then was about 6 inches deep (R. p. 639). He started his automobile to make his "get-away" and drove the car in front of the house. He testified as follows:

"* * * a rush of water come and flooded the engine. That water came from the south. As to the depth of that water, that was about a three-foot wave. I couldn't give you any idea as to the width of that wave. This wave got to my engine and the engine died. I didn't get it started again; I didn't even try; I got out and started to wade out. After the flood was over, I found my automobile. It wasn't just where I left it; it was moved north I would judge about 50 feet.

"Q. When you left the automobile that morning, how was the car standing with reference to the creek? Was it parallel to the creek or right-angles to the creek, diagonal to the creek, or—

"A. The car was standing east and west. When I found it, it was headed south and north. When I abandoned the car that morning, I had it in low; when the wave hit there, I didn't stop to take it out of gear,—I left it as it was and got out of there. I started for right straight for the church there, northeast. I was going to go to the railroad 'dump', if I could make it—the railroad 'dump'—the grade; that is, up high there where the main line is. I went to over Pickering's pool hall there, in the rooms.

"I observed conditions there that day in Wibaux; I was looking out of windows on the north side. On my way down to the Pickering pool hall, with reference to there being or not being any water in the town of Wibaux, will say that it got shallower there; it was shallower when I got to the pool hall there—shallower than where I left. The water I encountered there was moving north" (R. pp. 640, 641).

Early in the day Mr. Rowe saw water sweep over the low ground between the Massey place and the town. "Those waves came right on over north towards the town of Wibaux" (R. p. 751).

Mr. Paulson lived in a house located near the city water tank (R. p. 511). He and his family were trapped in their house. They tried to get away but the water flowing from the south to the north was too deep (R. pp. 513, 514).

THE RAILROAD EMBANKMENT WAS WASHED OUT SO AS TO
CREATE ADDITIONAL WATERWAYS.

Mr. Pickering, a witness for the plaintiff, saw the embankment break out and said that it kept crumbling (R. p. 56).

William Lentz, a witness for the plaintiff, testified that by 10 o'clock the embankment had gone out on both sides of the bridge (R. p. 149).

W. C. Howard, a witness for the plaintiff, saw the railroad embankment give way (R. p. 229).

Mr. Stark, a civil engineer, viewed the bridge at a time when 75 feet of the railroad embankment had washed out west of the bridge and 100 feet east of the bridge. At that time the high water extended as high as the ground on the west and the whole country was covered with water at that time (R. p. 507).

Mr. Zinda testified that the second and greatest raise of water came *after* the embankment was out (R. p. 641).

Mr. Pickering, a witness for the plaintiff, testified that *after* the railroad embankment had gone out the water went down and then rose again (R. p. 63).

Plaintiff tried the case on the theory that the defendant should have provided a longer bridge so that a greater waterway would have been created. *The washing out of the embankment created this situation and yet the whole town was flooded.*

HISTORY AND DEVELOPMENT OF THE BRIDGE.

The first railway bridge over Beaver Creek was built in 1880, and a model of this bridge and models of the later bridges, constructed on a scale of 1 inch equals four feet, were introduced in evidence, and certified to this Court by the trial court as exhibits (R. p. 576). The first bridge was a pile trestle timber bridge, 137 feet long (R. p. 579), and was the usual type of bridge used in the first construction of a railroad across the country (R. p. 577). After the railroad was completed to the coast, and long timbers were available, three bents of this trestle bridge standing in the channel of the stream were removed in 1884 and a pony Howe truss 44 feet long placed over the channel of the creek to eliminate the accumulation of drift that might come down the creek and lodge against the bents in the creek channel (R. p. 579). In 1896, this Howe truss bridge, with the bent trestles at the end thereof, was removed and a permanent steel bridge put in. This consisted of a central span 70 feet long resting on concrete piers and at each end thereof a 20 foot steel span, the outer end resting on pile abutments. The track was raised $3\frac{1}{2}$ feet at that time, so that the bottom of these steel girders would be as high as the bottom of the former Howe truss bridge (R. p. 580). From the top of the outer ends of the two 20 foot spans, there was a slope towards the base of the concrete piers supporting the 70 foot span (R. p. 581). See model of this bridge introduced in evidence (R. p. 576).

In determining the size of this permanent steel bridge, all available information as to past high water, cloudbursts, etc. was considered (R. pp. 581, 582, 615 & 711).

The steel bridge, as constructed in 1896, would carry about 22% more water than the former timber bridge at the same elevation of high water as in 1893 and 1897 (R. pp. 583-584).

In 1898 the Railway Company, in order to reduce the grade over Beaver Hill, located just west of Wibaux, raised its track a little over five feet and also raised the 70 foot and two 20 foot steel girders to correspond by adding to the height of the piers and abutments already there (R. p. 584). See model of this bridge.

This raise in 1898, of course, further increased the capacity of the bridge so that it then had a capacity about double that of the Howe truss bridge that was built in 1884 (R. p. 588).

In 1903, the pile abutments at the outer ends of the two 20 foot spans were replaced by concrete abutments without otherwise changing the bridge, which remained at that height and width until the flood of June 7, 1929 (R. pp. 586-587).

This bridge model has a wire along its side showing the high water elevations in 1893 and 1897, which were the same (R. p. 585); also a second wire representing the high water mark of 1921 and a third representing the high water mark of 1929 (R. p. 588).

The elevation above sea level at a point directly under the railway bridge is 2620 feet, according to the datum point of Engineer Oien (R. p. 570).

According to Engineer Lyman, the datum point taken by him beneath the bridge about two years later was 2 feet higher, or 2622 feet, probably due to the fact that the bed of the creek had filled in some after the flood of 1929 (See Oien's testimony, R. pp. 272 & 565, Lyman's testimony, R. p. 275).

Lyman, at various places in his testimony, in giving elevations around Wibaux, states that the elevation was so many feet above point "B", and point "B", as thus used by him, is his datum point under the railway bridge, but Mr. Lyman, in thus giving elevations, decided to use Oien's datum point of 2620, so in giving the elevation of Main Street at First Avenue

South, he gives it as 15 feet higher than point "B" (R. p. 572), which makes it the same elevation as that given by Oien of 2635 feet above sea level.

ACT OF GOD.

A flood does not necessarily have to be the only flood of somewhat similar character in the history of a stream in order to classify it as "an act of God" or to make it one which a party cannot reasonably anticipate. See the following cases:

- Central Trust Co. v. Wabash, etc. Ry. Co.*, 57 Fed. 441;
Pearce v. Newton, 41 Fed. 106;
Eagan v. Central Vt. R. Co., 69 Atl. (Vt.) 732;
Chicago R. I. & P. Ry. Co. v. Turner, 284 Pac. (Okla.) 855;
Velty v. Vulgamore, 24 Ohio C. C. 572, Affirmed, without opinion, in 67 N. E. (Ohio) 1103;
Norris v. Savannah, etc. Ry. Co., 1 So. (Fla.) 475;
Inhabitants of Palmyra v. Woolen Mills, 58 Atl. (Me.) 674;
People v. Utica Cement Co., 22 Ill. App. 159;
Director General of Railroads v. Bryant's, 105 S. E. (Va.) 389;
Pittsburgh, etc. Ry. Co. v. Gilleland, 56 Penn. 445, 94 Am. Dec. 98;
Diamond Match Co. v. New Haven, 13 Atl. (Conn.) 409;
Kansas City, etc. R. Co. v. Smith, 17 So. (Miss.) 78;
Borchardt v. Wausau Boom Co., 11 N. W. (Wis.) 440;
Greiner v. Alfred Struck Co., 171 S. W. (Ky.) 405.

In *Heckaman v. N. P. Ry. Co.*, 93 Mont. 363, 20 Pac. (2d) 258, involving this same flood, the Supreme Court of Montana found this was an unprecedented flood.

In the following cases, where the evidence as to the unprecedented character of the flood was not as strong as in this case, the court either sustained directed verdicts for the defendant, based on that defense, or held they should have been granted:

Eagan v. Central Vt. R. Co., 69 Atl. (Vt.) 732;
Chicago R. I. & P. Ry. Co. v. Turner, 284 Pac. (Okla.) 855;
Louisville & N. R. Co. v. Conn., 179 S. W. (Ky.) 195;
Wm. Tackaberry Co. v. Simmons Whse. Co., 152 N. W. (Ia.) 779;
Alt v. C. B. & Q. Ry., 148 N. W. (Neb.) 900;
Central Trust Co. v. Wabash St. Ry. Co., 57 Fed. 441;
Brown v. Chicago, B. & Q. R. Co., 195 Fed. 1007;
Sherwood v. St. Louis, etc. Ry., 187 S. W. (Mo.) 260;
Peel v. Chicago, M. etc. R. Co., 94 Mont. 334, 22 Pac. (2d) 617.

The cases of *Central Trust Co. v. Wabash, etc. R. Co.*, and *Louisville & N. R. Co. v. Conn.*, just cited above, are well considered cases on facts very similar to those in the case at bar, and are both cited with approval by this court in

Eikland v. Casey, 290 Fed. (9th Cir.) 880.

II.

NO EVIDENCE OF NEGLIGENCE.

The Railway Company was expressly authorized by statute to construct and maintain railway grades or embankments and bridges.

Section 6507, Revised Codes of Montana of 1921, provides:

“Every railroad corporation has power:

* * * * *

“4. To lay out its road, not exceeding in width one hun-

dred feet on each side of its center line, unless a greater width be required for the purpose of excavation or embankment, and to construct and maintain the same, with a single or double track, and with such appendages and adjuncts as may be necessary for the convenient use of the same;"

By Sections 2 and 7 of Act of Congress, July 2, 1864 (13 U. S. Stat. 365), authority was granted to build the railroad line.

Section 8645, Revised Codes of Montana of 1921, provides:

"Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

So, there was no trespass or nuisance *per se* in constructing the embankment and bridge on defendant's right of way, and it follows that there was no violation of duty to the owners of abutting land or infringement of their rights unless they prove it was because of negligent construction or maintenance of the embankment or bridge, and the defendant is *not an insurer* against damage therefrom, but can be held only for failure to exercise ordinary care.

Bray v. Cove Irr. Dist., 86 Mont. 562, 284 Pac. 539;

Jeffers v. Montana Power Company, 68 Mont. 114, 217 Pac. 652;

Eikland v. Casey, 290 Fed. (9th Cir.) 880;

Central Trust Co. v. Wabash, etc. Ry. Co., 57 Fed. 441.

The complaint alleges and it was necessary for plaintiff to prove that the bridge, as it existed in 1929, was insufficient to properly handle the "ordinary seasonally recurring high water" flowing in said stream prior to June 7, 1929.

The bridge, as finally constructed in 1898, had a greater capacity than the prior bridges existing there from 1881 to 1898 (R. pp. 581, 582 & 588).

If the bridges were sufficient to handle such ordinary high water as could be reasonably anticipated for 48 years, as they did from 1881 to 1929, without damage to property in Wibaux, and particularly to the property where plaintiff had his business in 1929, then they were sufficient bridges so far as plaintiff is concerned, and defendant cannot be held liable to plaintiff for the damages in 1929, if the flood of that year was unprecedented.

As shown above under heading "The Flood in Question Was Unprecedented," the highest water prior to 1929 was in 1921. It did no material damage to property in Wibaux. In other words, the bridges over Beaver Creek prior to 1929 did *properly handle the ordinary high water flowing in said stream*.

So plaintiff failed to prove, by any substantial evidence, the allegation of his complaint that the bridge was insufficient to handle the "ordinary seasonally recurring high water".

He also failed to prove his allegation that the defendant knew, or should have known, that a flood the size of the 1929 flood would arise in the ordinary course of nature, as the evidence clearly shows that there was nothing to indicate to defendant that there would be a number of cloudbursts in Beaver Creek valley, occurring at such a time that their *combined volume* would reach Wibaux as it did in 1929.

He also failed to prove his allegation that in June, 1921, and in other years, floods had occurred "causing rise of water *within six inches* as high on *defendant's said embankment* as that of June 7, 1929" (R. p. 5).

The undisputed evidence shows that the water in 1929 was 8.2 feet higher on *defendant's embankment* than in 1921, with no change in bridges.

RESTORING THE STREAM AS NEAR AS MAY BE.

Plaintiff, through his expert Lyman, attempted to show, in support of his allegations of negligence, that the channel of the stream was much wider than the railway bridge and that, therefore, the stream had not been restored to its former state of usefulness as near as may be and that defendant thereby violated the provisions of Section 6507 Revised Codes of Montana, 1921, which provides:

“Every railroad corporation has power * * *: 5. To construct their road across, along or upon any stream of water, water course * * * which the route of its road intersects, crosses or runs along, in such manner as to afford security for life and property; but the corporation shall restore the stream or water course * * * thus intersected to its former state of usefulness as near as may be, or so that the railroad shall not unnecessarily impair its usefulness or injure its franchise;”

As the evidence shows the railway bridges, as constructed, did handle in a proper manner all high water from 1881 to 1929, we submit that such fact, if it is a fact, is immaterial.

However, the evidence does show that the stream was restored, as near as may be, and that the bridge was as wide as the normal creek channel.

Lyman did not examine conditions at Wibaux until 1931 (R. p. 265), two years after the flood of 1929, which, of course, materially changed the channel in many places. His testimony is based largely upon conditions he found after the new bridge was built in 1929, and the old piers and abutments had been blown out. He referred to an old profile map of the defendant, Plaintiff's Exhibit No. 26 (R. p. 276) and from his interpretation of this profile, testified:

“To get anything like a flood flow, the banks are about 600 feet wide at this point. About a 10 or 11-foot flow

would show banks of 600 feet wide in the banks at the time the profile was made" (R. p. 277).

Of course, a flood 10 or 11 feet deep would overflow the banks of a normal creek channel, which channel has an elevation of 2620 feet at a point beneath the railway bridge (R. p. 305) and cover the low land south of the railway bridge (R. p. 250), mostly owned by the Railway Company as shown by the black lines on the relief map (R. pp. 60, 560 & 561). A 10 or 11 foot flood would come up against the bank of the benchland or level on which the buildings of the town stand, with an elevation of 2635 feet, and lack 3 or 4 feet of reaching the level of the town. In other words, according to Lyman, if a stream overflows its banks and spreads to the foothills on each side of the valley such foothills become the *normal* banks of the stream.

Lyman, on rebuttal, testified that in his opinion the channel was narrowed by the bridge from 170 feet to 65 feet (R. p. 786). At what point did Lyman find a 170 foot channel? Was it at some bend in the creek where the channel had been widened by erosion? The inconsistency in and conflicting statements of this witness will be discussed later, under the heading "Plaintiff's Case Was Based Upon Opinion of Witness Lyman," etc.

That Lyman's interpretation of the profile map (Plaintiff's Exhibit 26) is erroneous, was pointed out by Mr. Clements, Bridge Engineer (R. pp. 598-602), and Engineer Darling (R. p. 714), who approved the plan for the bridge built in 1896 (R. p. 709).

In a crooked stream flowing through a valley like Beaver Creek, the width of the channel of the stream will vary considerably due to the fact that where the stream bends one bank is constantly eroded, leaving low ground or sand bars oppo-

site thereto and at such points the width between banks constantly becomes wider, while the stream, for most of the year, only covers a small portion of this widened channel lying next to the bank that is being cut away. This process was clearly explained by Engineer Clements (R. pp. 601-602) and by Engineer Darling (R. p. 714). Counsel for plaintiff called Mr. Oien, defendant's engineer, to the stand and he testified:

"The width of the channel of the stream at the closest measurement that I made north of the bridge, *at that particular point*, was approximately 170 feet" (R. p. 295).

He did not show how far north of the bridge this measurement was made or whether at a bend in the creek where erosion had occurred.

Later Mr. Oien testified:

"In connection with the surveys to which I have already testified in connection with the examination at Wibaux and vicinity, I examined Beaver Creek and the country to the south of Wibaux. As to what the average width of Beaver Creek is between the banks where the banks are clearly defined, will say that where the banks are well defined and the creek fairly straight,—no erosion going on, so to speak, the width is from 65 to 70 feet. As to the character of the volume of water ordinarily that passes down Beaver Creek,—low water, there is very little, just a trickle" (R. p. 549).

Near the point where E Street intersects with Beaver Creek, Oien took a cross section (Defendant's Exhibit 18, R. p. 533), and the width of the stream bank to bank at that point was 72 feet, or from top of bank to top of bank 85 feet (R. p. 554). A cross section taken at Massey's ranch (Defendant's Exhibit 17, R. p. 554) shows the width of the banks there was 78 feet (R. p. 555). Both these cross sections were taken at points where

the creek bends, as shown by the relief map and there would be more or less erosion.

Mr. Woodard, who lived at Wibaux from 1909 to 1923, and who worked for the State of Montana for a number of years adjusting losses from hail, and was also manager of an elevator situated just east of the railway bridge during the summer of 1909, and walked over this bridge at least four times a day during that summer, testified:

“In regard to the channel of the stream as it passed under the bridge, that channel of the stream as compared with the bridge at that time, was about the same width I think” (R. p. 735).

The pile bents were removed from the channel of the stream in 1884 to clear obstructions in the stream and a 44-foot Howe truss bridge built over the channel (R. pp. 578-579). This shows that the width of the creek channel at that time was about 44 feet.

Mr. Kinney, a witness for plaintiff, who lived in Wibaux continuously from 1890 to 1915, and during that time was first a cow puncher, then in the grocery and meat business, ran a barber shop, livery stable and finally built a bank in 1906, which he ran until 1915 (R. p. 243), and who was also state senator from Wibaux County from 1914 to 1921, and a member of the city council from 1911 to 1915 (R. p. 248), testified:

“In ordinary times when there was no high water, I would say that the channel of Beaver Creek is only twelve or fifteen feet wide, and of course, this low ground of fifteen to twenty-five acres out south of the bridge, after the high water receded, would be covered with gravel and sand and would be practically worthless ground” (R. p. 251).

Mr. Darling, one of the outstanding engineers of the country (R. p. 310, 597-598), and who approved the plans for the Beav-

er Creek bridge, providing for a 70 foot span and two 20 foot approach spans (R. p. 709), testified that the "N. P. records further show the banks of Beaver Creek to be *no greater* distance apart than 80 feet" (R. p. 714).

THE COUNTY HIGHWAY BRIDGE CONSTRUCTED IN 1907.

The County of Dawson constructed a highway bridge 600 feet south of the railway bridge, which bridge was *60 feet long* and 10 feet high, as alleged in paragraph V of defendant's answer (R. p. 35), and admitted in paragraph IV of plaintiff's reply (R. p. 41). This bridge was designed by Engineer Baer, who was County Surveyor of Dawson County in 1907, after making a study of conditions and past high water records (R. p. 501). This county bridge had a capacity of 920 square feet (R. p. 502), as compared to 1190 square feet for the railway bridge, according to Lyman (R. p. 311), and 1320 square feet according to Clements (R. p. 591). Baer testified:

"Applying my knowledge of engineering to the situation, I designed a bridge that was considered ample and adequate" (R. p. 502).

Several photographs introduced in evidence show the normal channel of the stream south of the railway bridge to be about the width of the bridge.

In *Heckaman v. Northern Pacific Railway Company, supra*, the court said:

"Within the meaning of statutes such as that under consideration, the 'water course' is defined as a channel cut by running water, with *well-defined banks* through which water flows for *substantial periods of each year*. (New Jersey, I. & I. R. R. Co. v. Tutt, 168 Ind. App. 205, 80 N. E. 420).

“The statute, however, does not require that the *full width of the channel be left open*, but only that the water course be restored to its original usefulness as near as may be.” (Italics ours). (p. 263).

The phrase “as near as may be” as used in subdivision five of Section 6507, Revised Codes of Montana, quoted above, has been frequently construed and does not mean “as near as may be possible” or “as near as may be practicable”, but what would be reasonably sufficient in the judgment of experienced engineers.

Indianapolis, etc. R. Co. v. Horst, 93 U. S. 291, 301, 23 L. Ed. 898;

Mexican Central R. Co. v. Pinkney, 149 U. S. 194, 205, 37 L. Ed. 699;

Potter v. Robinson, 40 N. J. Law, 114;

Heckaman v. N. P. Ry. Co., 93 Mont. 363, 20 Pac. (2d) 258.

We submit that plaintiff has wholly failed to prove, by any substantial evidence, that the channel of the stream, as defined by the Supreme Court of Montana in the above quotation, was wider than 60 to 80 feet, or to prove that a bridge with a 70 foot span and two 20 foot spans, so constructed that half the area beneath the two 20 foot spans also handled high water, did not restore the usefulness of the stream as near as may be. There is no evidence that the usefulness of the stream for all purposes for which it was being used was not just as good or better after the bridge was built and the channel straightened and deepened, as explained by Mr. Kinney (R. pp. 243, 244, & 250), as it was before the bridge was built.

Engineer Clements testified that the stream was restored to its former state of usefulness as near as may be (R. pp. 594-595).

Engineer Darling also so testified (R. pp. 710-711).

Engineer Lillis testified that the conditions resulting from the flood would have been the same had there been no railroad embankment at Wibaux at all (R. pp. 653, 643, 646).

THE INADEQUACY OF THE BRIDGE NOT PROVEN.

That the bridge was adequate to handle the ordinary high waters is conclusively shown by the undisputed fact that from 1881 to 1929 it did handle such water without any material damage to any property in Wibaux, as is heretofore shown. The bridge, as constructed in 1896 and raised in 1898, carried over 22% more water than the earlier bridges (R. pp. 583-584 & 588).

A number of the best qualified bridge engineers in the country testified that the bridge, as constructed in 1896, was adequate and ample to handle all high water that could reasonably have been anticipated in Beaver Creek.

Engineer W. L. Darling who, since 1916, has maintained a private practice in St. Paul as consulting engineer, and who was an engineer for the Northern Pacific during the construction of the railroad through Montana and who, as its Chief Engineer, approved the plans for the 1896 bridge over Beaver Creek (R. p. 709), so testified (R. p. 710). Mr. Darling was selected as a member of the Advisory Commission by the United States Government and was sent overseas in connection with the rehabilitation of the Russian Railway System during the World War (R. p. 708).

Mr. Lyman admitted that Mr. Darling was a first-class engineer (R. p. 310).

Mr. M. F. Clements, a bridge engineer of wide experience, who among other projects designed the foundations for the Suisun Bay Bridge, now called the Martinez-Benicia bridge approximately thirty miles northeast of San Francisco, also

testified that the bridge in question was adequate (R. pp. 571, 572, 575, & 591).

Mr. Samuel Murray of Portland, Oregon, Chief Engineer of the O. W. R. & N., with over 30 years' experience in designing and locating bridges in the northwest (R. p. 697), so testified (R. pp. 698 & 702).

Mr. Bernard Blum, the present Chief Engineer of the Northern Pacific (R. p. 682), so testified (R. p. 688).

Engineer Baer testified that the 60 foot highway bridge, constructed in 1907, in his opinion "was ample and adequate" (R. p. 582).

Against this array of highly qualified engineers, and in the face of the history of said bridge from 1881 to 1929, the plaintiff had the testimony of Engineer Lyman, on rebuttal, who thought that the bridge was not adequate (R. p. 786).

The case of *Boston etc. Canal Co. v. Seaboard Trans. Co.*, 270 Fed. (1st Cir.) 525, Certiorari denied in 256 U. S. 692, is an instructive case on what constitutes negligence. In reversing a judgment for plaintiff, the court said that it was necessary for plaintiff to prove:

"That the danger of taking a vessel of that type into that canal was, before the accident, sufficiently obvious, so that men of ordinary prudence, with the knowledge that the canal officials then had concerning the currents in the canal and the steering qualities of vessels of this type, would not have permitted the attempt. It is not enough in the light of hindsight, to find that the canal officials and other prudent people would now conclude that vessels like the Chisholm should not make the attempt. * * *

"Negligence is failure to conform to the standard of the reasonably prudent man. Broadly speaking, it is departure from the normal, or what should be the normal.

* * *

“Obviously, when prudent and careful men, equally competent to judge of a difficult and doubtful situation, hold diametrically opposite views as to which of two courses is safer, it cannot be negligence to adopt either course. In such cases, there is no normal from which to depart” (p. 529).

So here, the evidence shows that prudent, careful men and engineers competent to judge of the sufficiency of a bridge to handle high waters had considered this bridge sufficient for forty-eight years, and it had been sufficient for that time. The only evidence to the contrary is the opinion of Lyman after an unprecedented flood had caused damage.

III.

NO EVIDENCE OF ACTIONABLE NEGLIGENCE.

This question is presented by Specifications of Error Nos. 1 & 2.

Subdivision 5 of Section 6507 of the Revised Codes of Montana of 1921, quoted above, which was enacted in the year 1895, provides that when a railroad intersects a stream it shall restore the stream “to its former state of usefulness as near as may be.”

This statute has been construed by the Supreme Court of the State to require only reasonable and ordinary care. The defendant was not required to anticipate an act of God and provide against such an occurrence.

Lyon v. Chicago, etc. R. Co., 45 Mont. 33, 121 Pac. 886;
Peel v. Chicago, etc. Ry. Co., 94 Mont. 334, 22 Pac. (2d)
 617;

Heckaman v. N. P. Ry. Co., 93 Mont. 363, 20 Pac. (2d) 258.

The statute is for the benefit of those who might be injuriously affected by the failure to perform the duty imposed.

It is not a question of whether the stream was restored to its former state of usefulness, but the question for determination is whether the restoration was such as to discharge the *duty owing to the plaintiff*. The plaintiff cannot complain except of negligence affecting him or his property. In other words, it was necessary for the plaintiff to allege and prove *actionable negligence*.

In 45 Corpus Juris, page 631, it is said:

“*Actionable Negligence*. Even though an act or omission may involve a lack of care and thus constitute negligence in the colloquial meaning of the term, it does not necessarily follow that any cause of action arises therefrom. To constitute actionable negligence there must be not only a lack of care, but such lack of care must involve a breach of some duty owed to a person who is injured in consequence of such breach.”

In the same volume, at page 647, it is said:

“In order that one may be held liable for negligence, it is essential that the duty breached by him should have been a duty which he owed to the person injured in person or property by the breach. The mere fact that the act or omission complained of involved a breach of duty owed to some person or persons other than the complaining party does not give the latter any right of action.”

In the case of *Savings Bank v. Ward*, 100 U. S. 195, the court, referring to cases which are cited and discussed, said:

“They show to a demonstration that it is not everyone who suffers a loss from the negligence of another that can maintain a suit on such grounds. On the contrary, the limit of the doctrine relating to actionable negligence, says Beasley, C. J., is, that the person occasioning the loss must

owe a duty, arising from contract or otherwise, to the person sustaining such loss" (p. 202).

The principle stated in the foregoing quotation was recognized and applied in the case of *St. Louis & S. F. R. Co. v. Conarty*, 238 U. S. 243, 59 L. Ed. 1291. In that case a recovery was sought for personal injuries resulting in death occasioned by the collision between a switch engine and a freight car which was not equipped with a coupler and a drawbar on the end which collided with the switch engine, as required by the Federal Safety Appliance Act. There was evidence that if the freight car had been so equipped, the equipment would have kept the switch engine and the car sufficiently apart to have prevented the injury. The negligence charged was the failure to have the freight car equipped with an automatic coupler and a drawbar of standard height, as required by the Federal Safety Appliance Act. The court said:

"We are of opinion that the deceased, who was not endeavoring to couple or uncouple the car or to handle it in any way but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar *operated as a breach of a duty imposed for his benefit*, and that the Supreme Court of the State erred in concluding that the Safety Appliance Acts required it to hold otherwise." (Italics ours) [p. 250, 251].

In the case of *Berlin Mills Co. v. Croteau*, 88 Fed. 860, 862, decided by the Circuit Court of Appeals for the First Circuit, the Court said:

"In determining whether the defendant is negligent, in a given case his duty to the plaintiff at the time is to be considered, and not his general duty, or his duty to others."

In *Bray v. Cove Irrigation District*, 86 Mont. 562, 284 Pac. 539, the court said:

“The defendants are *not insurers* against damage, but can be held only for failure to exercise ordinary care in the construction and operation of their plant. *Jeffer v. Montana Power Co.*, 68 Mont. 114, 217 Pac. 652. *Actionable negligence* arises only from a breach of legal duty, and to state a cause of action for damages resulting from negligence it is necessary that the complaint disclose the duty, the breach, and the resulting damages. Facts, and not legal conclusions, must be stated, and the complaint must set forth sufficient facts from which it can be said, as a matter of law, that the *defendant owed to the injured party a duty* arising from some legal relation existing at the time of the injury.” (Italics ours) [p. 540].

See also :

Fusselman v. Yellowstone Valley L. & I. Co., 53 Mont. 254, 163 Pac. 473;

Jonosky v. N. P. Ry. Co., 57 Mont. 63, 187 Pac. 1014;

Cleveland, etc. Ry. Co. v. Wisheart, 67 N. E. (Ind.) 993.

There is no evidence that the property of the plaintiff, which he occupied on June 7, 1929, and involved in this case, was ever damaged by water from Beaver Creek prior to that date, and it appears from all the evidence that the plaintiff's property would not have been damaged except for the *unprecedented flood* which occurred on that day. It necessarily follows that the duty of restoration of the stream or water course, required by the statute, was fully performed as to the property of the plaintiff.

It will, undoubtedly, be contended, in behalf of the plaintiff, as it was in the lower court, that the case of *Heckaman v. Northern Pacific Railway Company*, *supra*, which involved the same flood, should be accepted as a controlling authority in the decision of this case. That case, of course, was decided upon a different record and, furthermore, the question of lia-

bility presented in this case is one of general law, in the decision of which the Court is not bound by the decision in the *Heckaman case*.

In pointing out that Federal courts are not bound by decisions of the state court in deciding questions of general law, but are free to exercise their own independent judgment, the Supreme Court of the United States said:

“As respects the rule of decision to be followed by federal courts, distinction has always been made between statutes of a State and the decisions of its courts on questions of general law. The applicable rule sustained by many decisions of this Court is that in determining questions of general law, the federal courts, while inclining to follow the decisions of the courts of the State in which the controversy arises, are free to exercise their own independent judgment. That this case depends on such a question is clearly shown by many decisions of this Court. *Swift v. Tyson*, 16 Pet. 1, 19, was an action on a bill of exchange. Mr. Justice Story, writing for the Court, fully expounded § 34 of the Judiciary Act. * * * *Railroad Company v. Lockwood*, 17 Wall. 357, 366, *declined to follow the state rule as to liability of common carriers for injury of passengers. Liverpool Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 443, held a question concerning the validity of a contract for carriage of goods is one of general law. *Baltimore & Ohio Railroad v. Baugh*, 149 U. S. 368, 370, *so held as to the responsibility of a railroad company to its employees for personal injuries. Beutler v. Grand Trunk Railway*, 224 U. S. 85, 88, *decides who are fellow-servants as a question of general law.*” *Black and White Taxicab and Transfer Company v. Brown and Yellow Taxicab and Transfer Company*, 276 U. S. 518, at pages 530 and 531. (Italics ours.)

In the *Heckaman case*, the Court fails to distinguish between general negligence and negligence in failing to perform

a duty owing to the plaintiff. The Court stated that the evidence was sufficient to support a finding that there was a "violation by the defendant of the mandate of Section 6507 above, in that the defendant did not restore the stream to its original usefulness as near as may be."

The court then said :

"This antecedent and concurrent negligence is shown, and, as above pointed out, the evidence clearly shows that the damage done the plaintiff was 'in whole or in part', and perhaps wholly, due to this negligence. It follows that the fact that the flood of 1929 was unprecedented is no defense, * * *." (p. 265).

It thus appears that the *Heckaman case* was decided upon the assumption that there was negligence in failing to restore the stream as required by the statute, and that this negligence, concurring with the act of God, rendered the defendant liable. Whether the stream was restored to its original state of usefulness, so far as the property of the plaintiff in that case was concerned, was not considered.

The Supreme Court of the State in the *Heckaman case* adopted the same view as did the Supreme Court of Arkansas in the case of *St. Louis & S. F. R. Co. v. Conarty*, 155 S. W. 93, which was rejected by the Supreme Court of the United States in 238 U. S. 243, as already shown. The Supreme Court of Arkansas in that case said :

"The evidence establishes the fact that the injury to deceased would not have occurred but for the absence of proper equipment. That was the direct cause of the injury, notwithstanding the collision" (p. 95).

The Supreme Court of the United States decided that although the injury would not have occurred except for the negligence in failing to comply with the Safety Appliance Act by

providing proper equipment, there was nevertheless no liability for the reason that such failure was not a violation of a duty owing to the deceased, or, in other words, actionable negligence.

IV.

PROXIMATE CAUSE AND CONCURRING NEGLIGENCE.

The fact, if it be a fact, that the stream was not restored to its original state of usefulness, generally speaking, and that the damage suffered by the plaintiff was greater than it would have been if there had been no railway bridge or embankment, does not establish a liability against defendant, provided the plaintiff would not have suffered any damage *except for the unprecedented flood* or act of God.

Under such circumstances, it is the act of God and not the situation or *condition* which may have been negligently created that constitutes the proximate cause of the damage.

In the case of *Memphis & Charleston R. R. Co. v. Reeves*, 10 Wall. 176, which involved a destruction of property by an unprecedented flood or freshet, the court decided that the act of God was the proximate cause of the damage, notwithstanding it appeared that the property was negligently placed within the range of the destructive force.

In the case of *St. Louis I. M. & S. R. Co. v. Insurance Co.*, 139 U. S. 223, which involved the question of liability for the destruction of cotton by fire and it appeared that the cotton would not have been burned except for the negligent delay of the railway company in furnishing transportation, the court said:

“The delay of the defendant railway company to furnish transportation according to its contract with the com-

press company was in no legal sense a cause of the destruction of the cotton. It was simply one of a series of *antecedent events without which the loss could not have happened*, for, if the cotton had not been there, it would not have been burned. The cause of the loss was the fire, kindled by some unknown means, and in no way arising from or connected with the neglect of the defendant to furnish transportation. Upon principle and authority, that neglect was not the direct and proximate cause of the loss by fire, and did not make the defendant responsible for that loss to the owners of the cotton or to their insurers." (Italics ours) (p. 237).

In the case of *St. Louis & S. F. R. Co. v. Conarty*, 238 U. S. 243, 59 L. Ed. 1291, hereinbefore cited, in which a recovery was sought for injuries sustained by the collision between a switch engine and a freight car, which was not equipped with an automatic coupler and drawbar as required by the Federal Safety Appliance Act, and which if it had been so equipped would have prevented the injury, the court said:

"It is not claimed, nor could it be under the evidence, that the collision was proximately attributable to a violation of those provisions, (referring to the Federal Safety Appliance Act), but only that had they been complied with it would not have resulted in injury to the deceased." (p. 249).

For the same reason that the failure to comply with the Federal Safety Appliance Act was not the proximate cause of the collision in the above cited case, the failure of the defendant in the instant case to fully perform the statutory duty of restoring the stream, if there was any such failure, was not the proximate cause of the flooding of the plaintiff's property.

The case of *Cole v. German Savings & Loan Soc.*, 124 Fed. (8th Cir.) 113, 64 L. R. A. 416, is a leading case on the ques-

tion of proximate cause, *and when prior negligence cannot be considered as concurring negligence.* In that case, the court said:

“An injury that is the natural and probable consequence of an act of negligence is actionable, and such an act is the proximate cause of the injury. But an injury which could not have been *foreseen nor reasonably anticipated as the probable result of an act of negligence* is not actionable, and such an act is either the remote cause, or no cause whatever, of the injury. An injury that results from an act of negligence, but that could not have been foreseen or reasonably anticipated as its probable consequence, and that would not have resulted from it, *had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course,* and produced it, is not actionable. Such an act of negligence is the remote, and the independent intervening cause is the proximate, cause of the injury. * * *

* * * * *

“* * * A negligent act from which an injury could not have been foreseen or reasonably anticipated is too remote in the line of causation to sustain an action for an injury in every case, *and the concurring negligence of another cannot make it less remote,* nor charge him who committed it with responsibility for it to which he would not have been liable to answer in the absence of the negligence of the third party. * * * The best evidence upon such an issue is the testimony of experience, because what has been is our best guide to what will be. *The challenged acts and omissions of the defendant had been in operation for many months.* If they had produced such a consequence as the fall and injury of the plaintiff in the past, that fact would have raised a strong presumption that this was their natural tendency. *If they had produced no such result, the counter presumption was not less strong.* It is for this reason that courts frequently speak of the fact that no such injuries as those upon which the actions

under their consideration are based have occurred before as persuasive evidence that the disasters could not have been foreseen or reasonably anticipated as the probable result of the acts upon which the suits are based.” (Italics ours). (pp. 115-118)

In 1 Cooley on Torts, (3rd Ed.) page 99, it is stated:

“Proximate and Remote Cause. It is not only requisite that damage, actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is, that in law the immediate and not the remote cause of any event is regarded; and in the application of it the law rejects, as not constituting the foundation for an action, that damage which does not flow proximately from the act complained of. * * * *If the wrong and the resulting damage are not known by common experience, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action.*” (Italics ours)

In *Davis v. Schroeder*, 291 Fed. (8th Cir.) 47, the railway company *negligently left* a crossing gate down and one Jones ran into it with his auto, whereby he lost control of his auto and bumped into another auto, injuring the plaintiff, who was riding therein. In reversing a judgment for the plaintiff, the court, after citing and quoting from a number of cases, said:

“From these citations the clear rule is apparent that an injury that could not have been reasonably anticipated by a person of ordinary prudence and intelligence as the *probable result of the act of negligence is not actionable*; nor is such injury actionable if it would not have resulted from the alleged negligence, but for the interposition of some new and independent cause that could not have been reasonably anticipated. * * *

* * * * *

“The question of concurrent negligence does not save the situation here for defendant in error. *Concurring negligence cannot evolve proximate out of remote cause.* Concluding, as we do, that the wrongful act of Jones in driving his car at a reckless rate of speed, in violation of the city ordinance, was the proximate cause of plaintiff’s injury, the holding necessarily follows that the court erred in refusing to sustain the motion to instruct a verdict for defendant.” (*Italics ours*) (pp. 50, 52).

See also :

American Bridge Co. v. Seeds, 144 Fed. 605 (8 Cir.).

The question of proximate cause being one of general law, the rule recognized by the United States Supreme Court and other Federal courts should control.

However, the rule in the Federal courts is in harmony with the rule generally adopted by the state courts. See the following cases :

Staff v. Montana Petroleum Co., 88 Mont. 145, 291 Pac. 1042;

Sawyer v. Southern California Gas Co., 274 Pac. (Cal.) 544;

Johnson v. Mallory, 243 N. W. (Neb.) 872;

Paris & G. N. Ry. Co. v. Stafford, 53 S. W. (2d) (Tex.) 1019.

See also :

Stout v. Denver Park & Amusement Co., 287 Pac. (Colo.) 650;

Illinois Central Ry. Co. v. Oswald, 170 N. E. (Ill.) 247;

Gaupin v. Murphy, 145 Atl. (Penn.) 123;

Johns-Mandille v. Pocker, 26 Fed. (2d) 204;

45 Corpus Juris, p. 925, Section 488, and p. 935, Section 494.

In the opinion in the case of *Johnson v. Mallory*, above cited, the court said:

“Two acts of independent source are *not concurrent* in causing an injury, if one of them *merely furnishes a condition* by which such injury is made possible, and later such injury occurs through the efficient, self-acting, and independent operation of the other. In such case the latter and not the former is the proximate cause of such injury.” (Italics ours) (p. 875)

In the case of *Staff v. Montana Petroleum Co.*, above cited, the court, in holding that the prior negligence of the plaintiff in allowing gas to accumulate in the basement was not concurrent with the negligent act of lighting a match that caused an explosion, said:

“‘It is, however, wholly immaterial how the gas came into the cellar. It was entirely harmless there, except to persons inhaling it. If not interfered with, it had no tendency whatever to produce the accident complained of. It was a very explosive fluid, and the accident was caused by the explosion, and that was caused by the lighted match; and the only negligence, in any way connected with the accident, was in lighting the match in the cellar.’ (Lannen v. Albany Gaslight Co., 44 N. Y. 459).

“The rule is stated by the supreme court of Illinois in the following language: ‘If the negligence does nothing more than *furnish a condition* by which the injury is made possible, and that condition causes an injury by the subsequent independent act of a third person, *the two are not concurrent*, and the existence of the condition is not the proximate cause of the injury.’ ” (Italics ours) (p. 1046).

Also,

Simons v. Jennings, 46 Pac. (2d) 704 (Mont.) at p. 708 par. 9;

Texas Gulf Sulphur Co. v. Portland Gas L. Co., 57 Fed. (2d) 801 (1st Cir.)—Certiorari denied in 287 U. S. 601.

If, as we contend, there is no actionable negligence, so far as the property of the plaintiff is concerned, then, of course, there is no question of proximate cause for consideration. Furthermore, unless the defendant was guilty of actionable negligence as to the property of the plaintiff, there can, of course, be no negligence *concurring* with the act of God in producing the damage. It was *not ordinary high water* which caused the damage, but it was the *increased* flow over and above the ordinary high waters which caused the damage. In other words, *except for the unprecedented flood*, the water *could not have reached the plaintiff's premises* as it never had before. Under these circumstances, it cannot be said that the *condition* produced by the defendant caused any part of the damage.

V.

DAMAGES NOT SEGREGATED.

Assuming, for the purpose of argument, that there was actionable negligence, plaintiff wholly failed to prove what damages, if any, he sustained over and above the damages that would have occurred had there been no railway embankment or bridge across Beaver Creek. This question is raised by paragraph seven of defendant's motion for a new trial (R. p. 800), Specification of Error No. 1, and by paragraph (f) of Division One of Petition for a New Trial (R. p. 827), and by Division Three of the Petition for a New Trial, quoting an instruction on this point as given by the Court (R. p. 835), Specification of Error No. 2.

The evidence shows that the high water in Beaver Creek in 1929 at Massey's place, about 2250 feet south of the creek bank just south of town, reached a depth in some places of 14.2 feet above the bottom of the creek or low water mark (R. pp. 274,

308, 559, 646 & 681), and that this high water extended for 600 feet west from Massey's, according to Lyman (R. p. 313), and from 800 to 900 feet according to Oien (R. p. 556).

A cross section, Defendant's Exhibit D-17, taken at Massey's place (R. pp. 552-553), shows the elevation of high and low water there.

Mr. Massey testified that from his place this volume of water 14 feet deep and from 600 to 900 feet wide, "moving quite fast, going faster than a man would ordinarily walk" (R. p. 143) went straight from his place toward the city water tower or perhaps half way between the city tower (shown on Relief Map) and the Mattie Miller house (R. p. 142). The Mattie Miller house is located just north of the intersection of Beaver Creek and Wibaux Street and on the east side of Wibaux Street (R. p. 97).

The fall in the creek from Massey's to the bend in the creek just south of town where it turns east near the water tower and flows towards the Mattie Miller house is 5.6 feet. The distance between these two points is 2,250 feet (R. p. 565).

The admitted elevation of low water in Beaver Creek at its intersection with Wibaux Street, is 2626.7 feet, and the elevation of the high water in 1929 at the Mattie Miller house, only a few feet from such point of intersection, was 2640.6 feet (R. p. 306), or a difference of 13.9 feet. So this great volume of water passing Massey's place, was still at about the same depth above low water when it reached the creek bank just south of town, and west of the Mattie Miller house. See testimony of Engineer Lillis, on this point (R. pp. 648 & 653).

The elevation of the north bank of the creek in this bend south of town at the intersection of E. Street is only 2633.9 feet, or only 7.2 feet above the low water mark of 2626.7 at that point (R. pp. 306 & 314).

These undisputed physical facts show that a volume of water about 14 feet deep came rushing down from Massey's place and passed over the creek bed, only 7.2 feet deep, at the point where the stream makes more than a right angle turn to the east.

Defendant contends that this water necessarily overflowed the creek bank and would have damaged plaintiff's property had there been no railway embankment or bridge farther north. On this point, Mr. Lyman, plaintiff's witness, testified:

"Q. If you had water to a depth of 14 feet rushing across that country and nothing but seven feet to stop it, you would expect some of that water to go into the town, wouldn't you?

A. I would expect some of it to go down the swale, yes" (R. p. 314).

Mr. Lillis, an hydraulic engineer and a witness for defendant, testified:

"Referring to the relief map and the testimony that has been submitted, particularly the testimony of Mr. Lyman; he testified that the water at the Massey place reached a depth of about 14 foot during the flood of 1929; that it just spilled over the bank at the sharp bend at the upper side of the Massey place. That water then according to Mr. Massey, he laid his pointer on the relief map, showed the direction of the flow, the direction almost directly north toward the town. At the next large bend in the creek Mr. Lyman testified, so did other witnesses,—and I measured it myself—that the bank was about 7 foot high. That 14-foot depth of water coming down the valley in the direction of that bend, 7 foot of it would be stopped by the bank. Of course, it would splash up at that point the same as at Mr. Massey's. The upper 7 foot of it would go right on over the town. Of course, it would be obstructed as it entered the town, somewhat; as it got to the buildings, the obstruction would be greater. At first, the force—the greatest force—would have been where

the water hit the houses; they are the houses that were nearest, were moved from their foundation. When it got up into the town, it was just like another bank. That deflection would account for the Methodist parsonage floating off its foundation and floating to the east" (R. pp. 646-647).

As to whether the volume of water 14 feet deep at Masseys would spread out before reaching the bank near the Mattie Miller house and not flow through the town, Mr. Lillis testified:

"Now, the juror was asking about the depth of the water. The depth at the Mattie Miller house might have changed considerable due to the area of the cross section,—if conditions had been right, it might have been—but the testimony shows it didn't change materially; the testimony shows it was about 14 feet still. As to whether a flood of the proportions of the one that struck Wibaux on June 7, 1929, could be taken care of by any railroad bridge, so far as damage south of the town and so far as the railroad embankment is concerned, will say that all the analysis I can make from all the facts assembled, makes me say that the condition on that portion south of the town would have been practically the same if there had been *no railroad embankment there at all*" (R. p. 653). (Italics ours).

See also his testimony on Cross-Examination (R. p. 679), and on Re-direct Examination (R. p. 681).

That Mr. Lillis' opinion and testimony regarding the action of this water is correct, is shown by the testimony of 11 witnesses, then in Wibaux, the only one of whom is connected with the Railway Company being Mr. Kimball, its Road Master. They all saw the water overflowing this bank in waves and carrying away towards the north buildings, sheds, etc. (R. pp. 101, 445 to 447, 466 to 469, 512-514, 640, 724, 728, 738, 746 & 751).

In fact, every witness from Wibaux testified that the water was flowing *north* on Wibaux Street *at all times* during this flood except the witness White, a plaintiff in a similar action, and the editor of the newspaper (Defendant's Exhibit "C"), in which paper he referred to this great wall of water. White testified that it was customary for the water to first flow north to the railway embankment and then turn and flow south to the creek channel between the city water tank and the street east of it, and then again flow south through the town. We submit that the court will take judicial notice of the fact that water does not act in any such manner (R. pp. 105, 106 & 115).

Mr. White lived on the north side of the railway embankment, which would obstruct his view to the south. Furthermore he did not get up that morning until about 7 o'clock (R. p. 106), and as the waves of water came over the bank south of town before 7 o'clock (R. pp. 444, 472, 512, 639, 738, 746 & 750), White did not have an opportunity to observe the action of the water in 1929, testified to by these parties.

As to this absurd theory of Mr. White's, Engineer Lillis testified as follows:

"Q. You didn't get it from any witness that there was water flowing backwards?

A. If water came down that stream, it never turned around and went back up; that is against all laws of nature" (R. p. 659).

See also testimony of Engineer Blum on this point (R. pp. 693 & 696).

The undisputed physical facts and evidence referred to above show that plaintiff's store would have been flooded to a depth of at least four to five feet regardless of the embankment or bridge.

If a part of plaintiff's damage was due to the act of God, independent of any condition caused by the embankment and bridge, then the burden is on the plaintiff to show what portion of the damage was due solely to the embankment and bridge. If this is left to speculation or conjecture, as it was at this trial, the plaintiff cannot recover.

17 Corpus Juris, section 90, page 758, states the general rule as follows:

"Where there is evidence as to the damage from various causes, as to a portion of which defendant cannot be held responsible, and no evidence as to the portion of the damage resulting from the separate causes, the proof is too uncertain to permit the jury arbitrarily to apportion a part or all of the proved damages to the acts for which defendant is responsible."

In *Fort Worth, etc. Ry. Co. v. Speer*, 212 S. W. (Tex.) 762, plaintiff sued for damages from flood water alleged to be due to insufficient opening in railway bridge over stream. In reversing judgment for plaintiff, the court said:

"In the instant case it does not appear that the construction of the bridge as built was unlawful, or that at the time of the building there was any invasion of the rights of the plaintiff or any injury to his land. It was only upon the occasion of heavy rains and consequent increased flow of water down the stream that the impediment created such an obstruction as caused the water to overflow plaintiff's lands and injure them and the crops thereon. * * * Where it is shown that land would have been flooded by natural causes, but the defendant's act has increased the loss, the measure of damages is the increase of loss. 3 Sedgwick on Damages (8th Ed.) paragraph 942, pp. 57, 58. * * * Plaintiff testified that in his opinion the damage caused to the lands and the crops by overflow were more extensive subsequent to the con-

struction of the bridge than before, and that the overflow covered a larger area, but he failed to show to what extent the overflows were greater or the damage increased. It was incumbent upon him to do this in order to sustain a recovery. * * * But he failed to show what the increase of loss was by reason of the construction and maintenance of the bridge, and how much of said loss would have been sustained in the absence of the bridge. As we have concluded that this case must be reversed for other errors hereinafter noted, we will content ourselves by stating that upon another trial the extent of the increased damage, if any, should be affirmatively shown" (pp. 764, 765).

In *Brown v. Chicago, Burlington & Quincy Ry.*, 195 Fed. 1007, the court, on this point, said:

"Summing up the principles applied in these decisions, it may be stated that in an action of this kind it is not sufficient to prove an obstruction of a stream, and that such obstruction contributes to causing an overflow and an injury; but the amount of overflow and damage which is caused by such obstruction must be traced. Ordinarily this requires that a comparison be made by evidence as to what overflow and injury would have existed in the course of nature under similar circumstances if there had been no obstruction, and only for the differences between the results is the one causing the obstruction liable.

"As there was no evidence from which the jury in these cases could have made this comparison, the verdicts were properly instructed for the defendant, and new trials are denied."

To the same effect as the above cases, see also the following:

Western Union Tel. Co. v. Totten, 141 Fed. 533;

C. B. & Q. Ry. v. Gelvin, 238 Fed. (8 Cir.) 14;

Knowlton v. Chicago, etc. Ry. Co., 131 N. W. (Minn.) 858;

Darnall v. Georgia, etc. Ry. Co., 68 S. E. (Ga.) 584;

Texas, etc. Ry. v. Dunn, 17 S. W. (Tex.) 822;
Miller-Link L. Co. v. Stephenson, 265 S. W. (Tex.) 215;
Chicago, etc. Ry. Co. v. Martin, 37 S. W. (2d) 207.

The rule announced in the above cases was recognized as correct by the Supreme Court of Montana in the *Heckaman case*, as the Court said:

“If, in a given case, it is conceded or shown that damage would have resulted regardless of the existence of an embankment, but additional damage was suffered by reason of the negligent maintenance of the embankment, the plaintiff must produce evidence as to the amount of damage for which the defendant is liable. (Fort Worth Ry. Co. v. Speer, above.)” (p. 266).

The court there refused to follow such rule on the ground that the case was not tried on that theory because the defendant had not interrogated witnesses for the plaintiff on that question and had relied solely upon the testimony of its expert that there would have been damage to Heckaman’s property had there been no embankment or bridge at all. This rule of law, which we believe the court should not have ignored on that theory, cannot be ignored on that ground in this case, as witnesses for both the plaintiff and defendant were examined thereon. (See plaintiff’s testimony, R. pp. 173 & 185-188; Lyman’s testimony, R. pp. 314 & 788; Lillis’ testimony, R. pp. 653, 679 & 681).

In the *Heckaman case*, the Supreme Court of Montana, at page 266, stated that defendant’s expert said there would have been a foot and one-half of water in the Heckaman store in 1929 if there had been no railway embankment (the Heckaman store is located just east of the Wagner store on the north side of First Avenue South). At the time this expert testified, he

relied on the 1929 high water elevation at Massey's place of 11 feet, as given by Lyman at the trial.

Later, these elevations were checked over by Oien and Lyman (R. pp. 304 & 305). It was then found that Lyman's elevation of high water at Massey's was 3 feet too low (R. pp. 671, 681 & 683). Defendant's expert did not have this correct elevation at Massey's at the time he testified (R. p. 682). If he had known the water was 14 feet high above low water at Massey's, instead of 11 feet, his figures on the depth of the water on Wibaux Street, regardless of the embankment, would have, of course, been greater than 1½ feet (R. p. 672).

As plaintiff's property would have been damaged regardless of the embankment and bridge, and as he failed to prove any damage in excess thereof, or furnish any reasonable basis for the jury to segregate such damages, defendant's motion for a directed verdict should have been granted. Also its petition for a new trial should have been granted on this ground, and also on the ground that the verdict is against the law as contained in the instruction of the Court on damages (R. pp. 813 & 835).

VI.

PLAINTIFF'S CASE WAS BASED UPON OPINION OF WITNESS LYMAN. LYMAN'S TESTIMONY WAS IMPEACHED AND HE WAS SO COMPLETELY DISCREDITED THAT VERDICT CANNOT BE PERMITTED TO REST ON HIS TESTIMONY.

Plaintiff's case is based mostly on the evidence of Lyman as an expert. The alleged insufficiency of the bridge, narrowing of the channel, volume of water, etc. is based solely on his opinion evidence.

At this trial, and the one immediately preceding it in the state court, Lyman testified that he computed the flow of wa-

ter past Massey's place in 1929 at 15,813 cubic feet per second (R. p. 288), and the speed of the water at that point at three miles per hour (R. p. 312).

He also testified as an expert for plaintiff at other similar trials in the state court (R. p. 314).

On cross-examination at this trial, he admitted that at one of these earlier trials in January, 1934, he testified that the water at Massey's was traveling about five to six miles per hour, and at that velocity there would be about 33,000 cubic feet per second (R. p. 317). Also admitted that at the trial of the case of *Bailey v. Northern Pacific Railway Company*, in September, 1933, he testified that the water at Massey's was going about eight miles per hour (R. p. 318), and that he computed the flow at 30,000 cubic feet per second (R. pp. 789-790).

At the earlier trials, Lyman testified that the elevation of the high water in 1929 at Masseys was 11 feet above low water. It was upon that basis he and an expert for the defendant computed a flow of 30,000 cubic feet per second in 1929 (R. pp. 681, 683 & 790).

When Lyman and Oien, before this trial in the Federal Court, checked these elevations (R. p. 682), Lyman had to admit that the water was 14.2 feet above low water at Masseys in 1929 (R. pp. 304, 305, 307, 671, 681 & 683).

Lyman's opinion that the bridge was insufficient to handle the ordinary high water that could be expected was based largely on Myer's and Talbot's formulae (R. pp. 288, 319 & 320). Upon being required to read the authors qualifying comments on such formulae (R. pp. 320 & 321), it shows that they apply to "culverts" instead of "bridges," and were given under a chapter in the book headed "culverts and minor bridges". It also appears from these authors' comments that these formulae are not reliable as they depend so much on the judgment of the

engineer in choosing the proper co-efficient, and it also appeared that "bridges and trestles" are considered by the authors in an entirely different chapter (R. p. 321); that such formulae as Myer's and Talbot's are worthless in determining the proper size of a *bridge*, like that over Beaver Creek, and are only used in the construction of "small culverts". (See testimony of Bridge Engineer Clements, R. pp. 592, 593, 605 & 606, and especially p. 635 indicating that counsel for plaintiff, in showing witness a book, had endeavored to conceal certain language referring to these formulae).

Samuel Murray of Portland, Ore., a bridge engineer, testified regarding these formulae, as follows:

"I have an opinion as to such formulae being accurate to determine the open area necessary for a bridge such as the railroad bridge over Beaver Creek at Wibaux. Such formulae are entirely useless for an area of any great extent and, in fact, I have very little confidence in them for any use whatever. I ceased using them after I had been in practice for a very few years; they are totally, or approximately unreliable" (R. p. 699).

In *Peel v. Chicago, etc. Ry. Co., supra*, the court, at page 619, comments on the variance and uncertainty of such formulae, even for culverts, and said:

"Did these engineering formulae raise a conflict in the evidence upon which to justify a finding of negligence in providing inadequate culverts? We think not, in view of the history of this drainage area."

Engineer Baer planned the County Highway bridge across Beaver Creek, with an area of 920 square feet, which he considered ample and adequate to take care of Beaver Creek (R. p. 502).

Lyman, in an attempt to escape the force of the fact that as late as 1907 the County constructed a bridge with an area

270 square feet less than the railway bridge, which Lyman admits had an area of 1190 square feet (R. p. 337), contended that the low ground between the county bridge and the elevators to the east was intended as an "escapement" or spillway for high water, and that the area of a cross section from the level of the county bridge east was 2230 square feet, which should be included in figuring the area or capacity of the county bridge (R. pp. 280 & 281).

This bridge was built higher than the highway to the east thereof. The ground east of the bridge was not scooped out to make a spillway. A main highway, known as the "Red Trail" runs from the bridge east over this natural low land on a fill, and is a graveled road (R. pp. 550-551). A small culvert under the road was provided to handle water between the elevator and raised sidewalk (R. pp. 551 & 552).

According to Lyman's theory, whenever there was high water in excess of what the bridge proper would carry, it was intended by the parties constructing the bridge that the excess would rush over this highway. In other words, wash out the highway and shut off travel from using the highway and bridge. The absurdity of such theory is apparent.

Mr. Baer, the engineer who designed the county bridge testified the bridge was designed to carry all the water that could be anticipated. Mr. Baer testified positively that no spillway was intended either east or west of the county bridge (R. p. 502).

A few moments before Lyman had testified that the banks of the stream were 600 feet apart (R. p. 277). He was then seeking to show that this low land south of the railway bridge and east of the county bridge was the *creek channel*—not an "escapement" for high water in excess of the capacity of the 60 foot county bridge.

By reason of the conflicting, inaccurate, vacillating and absurd testimony of Lyman, as shown above, we submit that his evidence and opinion that the bridge was not adequate to handle the ordinary high water in Beaver Creek does not even raise a substantial conflict with the evidence of the defendant, including the history of the stream, that it was an adequate bridge.

In *Casey v. N. P. Ry. Co.*, 60 Mont. 56, 198 Pac. 141, the Court, in holding plaintiff's evidence was insufficient to create a substantial conflict with that of the evidence of the defendant, said:

"In his testimony given upon the trial of this case the plaintiff contradicted himself repeatedly; contradicted the allegations of his verified complaint; was contradicted by his previous statements, by the physical facts, by every one of defendant's witnesses, and by his own witness, Marchington. Some of his declarations are too transparent to be entitled to credence, are improbable upon any supposition short of actual mental imbecility" (p. 145).

See also:

Grand Trunk W. R. Co. v. Holstein, 67 Fed. (2d) (6th Cir.) 780.

Penn. Railroad Co. v. Chamberlain, 288 U. S. 333.

With Lyman so completely discredited and impeached, the situation is similar to that in the case of *Southern Pac. Ry. v. City of Los Angeles*, 26 Pac. (2d) (Cal.) 896, where the court said:

"* * * we are nevertheless impressed with the fact that at least four engineers, called as experts on drainage and water control and all familiar with the aqueduct and physical features of the country in the neighborhood of the break, testified in effect that it was 'safe and prudent to

construct and maintain such aqueduct at the location described without providing overhead or underground drainage or other drainage for the territory to the west of the aqueduct other than the drainage afforded by the aqueduct.'

"No contrary expert opinion was offered, and the court, knowing from the hypothetical questions propounded to the engineers who did testify that they had in mind, at the time of answering, the rainfall records and climatic conditions of the area involved as well as the structure and condition of the cone and means provided for turning the water through waste gates, was justified in our opinion in finding that no negligence was attributable to respondents in the construction of the aqueduct" (p. 899).

VII.

VERDICT CONTRARY TO LAW AS GIVEN BY COURT.

Defendant's petition for a new trial (Specification of Error No. 2) was based in part on the allegation that:

"The verdict is contrary to the law as given to the jury and particularly in the following portions of the Court's instructions, to-wit:

" 'If you believe from the evidence that the Railway Company, in raising the embankment of its railroad grade and constructing its bridge across Beaver Creek in 1898, employed civil engineers of at least ordinary skill and ability, and that it constructed, and thereafter maintained, the embankment and openings in question in accordance with the usage of ordinarily prudent and careful engineers under like circumstances, and so as to reasonably handle and care for such ordinary recurring floods or rises in Beaver Creek as were then known and as could be reasonably anticipated by the exercise of ordinary foresight and prudence, and that said openings did handle, in a reasonable manner, all flood waters prior to June 7, 1929, and that the flood of June 7, 1929, was an unusual, excessive

and extraordinary flood, which could not have been reasonably anticipated, then the defendant was not guilty of negligence; but the damage to plaintiff was the result of such extraordinary flood or act of God and your verdict should be for the defendant.'

" 'A water course or stream is the channel cut by running water with well defined banks and bottom through which water flows for substantial periods of each year.

" 'In constructing a railway bridge, the law does not require that the full width of such channel be left open but only that the water course be restored to its original state of usefulness, as near as may be. The phrase 'as near as may be', as used in this law, does not mean 'as near as might be possible'. It contemplates some variation from the original condition of the stream and allows some discretion in the engineers of the railway company in constructing a bridge to make such reasonable changes in the flow of the water therein as they find necessary in constructing a safe and practical bridge over the stream.

" 'Even if you find from the evidence that the channel was somewhat narrowed by the bridge, as constructed in 1896 and raised in 1898, but also find that the channel was then, or thereafter, straightened and deepened, so that it still carried off all the water which could have been reasonably anticipated by the exercise of ordinary foresight and prudence, including the ordinary flood waters, without any more interference with the flow thereof, than was reasonably consistent with the right granted the railway company to construct a safe and practical bridge over such stream, then you are instructed that there was no unlawful interference with the water course or channel of the stream by the defendant, and that it cannot be held guilty of negligence in the construction and maintenance of such bridge over the stream as it existed prior to June 7th, 1929' " (R. pp. 846, 847).

We submit that under the instructions given by the court and quoted above, and the undisputed evidence in this case on

the points covered by such instructions, that the jury disregarded the law as given therein by the court, and that a new trial should be granted upon this ground.

In *United Press Ass'n v. National Newspapers Ass'n.*, 254 Fed. (8th Cir.) 284, the court said:

"It is our opinion that the trial judge, being an integral part of the court charged with the duty and responsibility of seeing that justice was administered between the parties, should have granted a new trial, and that his failure so to do was an abuse of his discretion. The jury not only disregarded the undisputed evidence in the case, *but also the charge of the court.*

"For the error in refusing to grant a new trial, the judgment below is reversed, and a new trial ordered." (*Italics ours*) (p. 286).

In *Stetson v. Stindt*, 279 Fed. (3rd Cir.) 209, the court said:

"The third is based on the broad propositions of law that a verdict *which is contrary to the law of the case or which is not sustained by evidence in the case* must be set aside. On this general law some courts have squarely met the question and have held that an instruction on the measure of damages is an instruction on the law, that a verdict by the jury in disregard of such instruction calls for a new trial, and that, under these circumstances, refusal by the trial court to grant a new trial constitutes reversible error. (*Citing cases*).

"We are persuaded by the ratio decidendi of the last line of authorities that a verdict like the one under consideration, which is perverse and directly *violative of the charge of the court* and is wholly without evidence to support it, cannot stand." (*Italics ours*) (p. 211).

VIII.

REJECTION OF EVIDENCE.

GOVERNMENT REPORT.

Specification of error No. 3 relates to the ruling of the court in sustaining plaintiff's objections to defendant's Exhibit D-12, which is a copy of the report of the Army Engineers to the Department of War regarding physical conditions and flood control at Wibaux, made after the flood of 1929 (R. pp. 322-324, 333 & 686). This exhibit has been certified to this court by the trial court. The report of the Army engineers has been submitted to Congress and was published as 73rd Congress, 1st Session—House Document No. 64. The report states:

“The maximum rate of run-off of record in the basin occurred on Beaver Creek at Wibaux, Mont., on June 7, 1929. It was estimated by the United States Geological Survey to be 33,000 second-feet for a drainage area of 311 square miles and was caused by intense rains over a small area, or what is locally termed as a ‘cloudburst’.”

This report shows the railway bridge over Beaver Creek was considerably enlarged after the 1929 flood. Notwithstanding the enlarged bridge, this report, among other recommendations, states:

“Practically the entire town is located within the alluvial flood plain of Beaver Creek, and in order to obtain complete protection from a flood similar to that of 1929, it would be necessary to construct levees on both sides of Beaver Creek south of the Northern Pacific Railroad tracks and on the west side north of the tracks. * * * The left bank levee would encompass all the municipal area of importance. The right bank levee would be 0.76 miles in length and average 9 feet in height, while the left bank levee would be 0.93 miles in length and would average 9 feet in height.”

We submit that the jury should have had the benefit of the information contained in this report, which shows that regardless of the size of the bridge, damages would occur from floods like that in 1929 unless high dykes are constructed to protect the town.

Furthermore, Lyman testified that a bridge 116 feet long would have been sufficient for the 1929 flood, based on his computation of 16,000 cubic feet per second at Massey's place (R. pp. 301-302) as compared with his prior computation of 30,000 cubic feet per second at Massey's place (R. pp. 789-790). The admission of this report of the Army engineers would have been material evidence on behalf of the defendant, in view of such testimony of Lyman.

This document having been duly certified to by the proper official at Washington, D. C., was admissible without further proof. The exhibit in question was a report made by the United States Government in the course of an investigation conducted by it pursuant to the provisions of an act of Congress (see letter of transmittal of the Secretary of War to the Speaker of the House of Representatives, transmitting House Docket No. 6401). The exhibit in question is a part of the report. A Federal law makes the Secretary of War the custodian of the original of the exhibit.

"The Secretary of War shall have the custody and charge of all the books, records, papers, furniture, fixtures, and other property appertaining to the department." (Rev. Stat. § 217, 5 U. S. C. A. § 191).

A Federal statute provides that the exhibit *shall* be admitted in evidence.

"Copies of any books, records, papers, or documents in any of the executive departments authenticated under the seals of such departments, respectively, shall be admitted

in evidence equally with the originals thereof." (Rev. Stat. § 822, 28 U. S. C. A. § 661).

While the statute provides that such exhibits shall be admitted, even though there had been no such statute as above quoted the exhibit should have been received.

Chief Justice Marshall, speaking for the Supreme Court of the United States, said:

"Whether these acts be or be not construed to authorize the admission of the copies offered in this cause, we think that, on general principles of law, a copy given by a public officer whose duty it is to keep the original, ought to be received in evidence." *United States v. Percheman*, 32 U. S. (7 Peters) 51, 85; 8 L. Ed. 604.

Meehan v. Forsyth, 65 U. S. 175 (6 C. C. A.)

"We understand the general rule to be that when a public officer is required, either by statute or by the nature of his duty, to keep records of transactions occurring in the course of his public service, the records thus made, either by the officer himself or under his supervision, are ordinarily admissible, although the entries have not been testified to by the person who actually made them, and although he has therefore not been offered for cross-examination. As such records are usually made by persons having no motive to suppress or distort the truth or to manufacture evidence, and moreover, are made in the discharge of a public duty, and almost always under the sanction of an official oath, they form a well-established exception to the rule excluding hearsay, and, while not conclusive, are prima facie evidence of relevant facts. The exception rests in part on the presumption that a public officer charged with a particular duty has performed it properly." *Chesapeake & Delaware Canal Co. v. United States*, 240 F. 903, 907 (3 C. C. A.).

The above case was affirmed by the United States Supreme Court and is reported in Volume 250 U. S. at page 123.

Cohn v. United States, 258 Fed. 355 (2 C. C. A.).

Long v. United States, 59 Fed. (2d) 602, (4 C. C. A.).

Breitmayer v. United States, 249 Fed. 929, 932-933 (6 C. C. A.).

Evanston v. Gunn, 99 U. S. 660, 666; 25 L. Ed. 306.

As the record is lengthy we will refer to several matters regarding which we believe the evidence in the record should be pointed out and discussed under special headings:

IX.

MISCELLANEOUS MATTERS.

RECORD OF HIGH WATER IN 1900.

At the trial, counsel for plaintiff stressed the fact that a photostatic copy of record kept in St. Paul (Defendant's Exhibit D-24) indicated that the water was higher in 1900 than it was in 1921, and that the record was therefore notice to the defendant of the possibility of a flood such as occurred in 1929.

The evidence clearly shows that this record was erroneous for if it was correct, the 1900 high water came up to the bottom of the steel girder of the bridge, as it was raised in 1898 and existed in 1900, and would have reached an elevation of 2635.1 feet or 3.7 feet higher than the 1921 high water at the bridge, and flooded the town (R. p. 603).

No witness living at Wibaux or in the valley testified to high water in 1900. They all testified that in 1921 the water was the highest in Wibaux prior to 1929.

At the time of the trial of the *Heckaman case*, the witnesses for defendant had not checked matters to determine if this

record of 1900 high water (which no one recalled) was correct or not and could not check it during such trial at Baker. After that trial, it was checked up in St. Paul and no data or report found as a basis for the entry of such record (R. p. 624).

That this record is not correct is fully explained by Mr. Clements, Bridge Engineer for the defendant (R. pp. 603, 633 to 636).

Engineer Darling testified:

“The highest known water in Beaver Creek at Wibaux up to 1896 was the high water of 1893 with elevation of 2626.3 at the railway bridge. To my knowledge the 1893 high water was the highest water in Beaver Creek at Wibaux during my service with the N. P. Railway Company, 1879 to 1916” (R. p. 712).

Chief Engineer Blum testified:

“As I testified in the September and October trial, I had investigated that and am convinced that that record is stated erroneously” (R. p. 691).

The testimony of several witnesses living in Wibaux in 1900 shows there was no high water that year (R. pp. 637, 638 & 722).

OLD PHOTOGRAPHS.

Plaintiff introduced a photograph (Plaintiff's Exhibit 1), which shows high water in Beaver Creek at some time (R. pp. 49 & 61). This photograph shows a stone wall in the left center and about the middle of the picture, which wall is marked “X” with lead pencil (R. p. 62). This wall is also shown on defendant's relief map, immediately south of Orgain Avenue and west of Beaver Creek (R. p. 560). The wall is about 5 feet high and the picture shows that the water was only about half way up on the wall (R. p. 562). The elevation of the top of this stone wall is 2631.6 feet, or 3.8 feet below the level of

Wibaux Street (R. pp. 559 & 560). Therefore, this photograph shows that such high water at that time was about 6.3 feet below the level of the town and not such as to indicate danger. The picture also shows that the water was not being *impounded* but was *moving rapidly* towards the north and through the bridge.

Ella Graham, who lived in Wibaux from 1884 to 1906, and most of the time right on the west bank of the creek near this stone wall, testified :

“I don’t recall that water ever got high enough to overflow this stone wall that Pierre Wibaux put in there, and I don’t recall that I ever saw water high enough to be on Wibaux Street in front of my place” (R. p. 722).

A number of old pictures were introduced, showing water over the low ground south of the railway bridge, some showing blocks of ice in the water. These were probably taken while the concrete dam north of the bridge backed the water up over this low ground, as testified to by Mr. Kinney (R. p. 250), as the evidence is very indefinite as to just when they were taken. The adequacy of the bridge to carry ordinary high waters had nothing to do with the water impounded by this concrete dam, which was blown out long prior to 1929 (R. p. 250), or by ice lodging against it.

WATER UP TO THE STOCKYARDS.

At the trial, counsel for plaintiff contended that prior to 1929 high water had gotten up to the stockyards, basing such contention on Mr. Kinney’s testimony that he had seen water “from here at the bank *over to the stockyards*” (R. p. 242). Later, Mr. Kinney testified :

“I mean from the road here to the *rise at the stockyards*, probably more than a quarter of a mile wide. I mean

from the present county bridge *to the elevators there, around the elevators. That ground is all several feet lower than the level of Main Street here*" (R. p. 253).

The relief map drawn to a scale shows the *elevators* are much lower than the stockyards. If water from *Beaver Creek* had gotten up *to the* stockyards while Mr. Kinney had lived there, it would have been about 7 feet deep on Wibaux Street, as lowest point of stockyards is 22.1 feet above point "B" (R. p. 279) or 2642.1 feet as compared with 2635 feet on Wibaux Street.

INTERVIEW WITH RAPELJE.

In an attempt to show defendant knew its bridge was not sufficient, Dan Sutherland, a plaintiff in a similar case pending, testified to hearing a conversation which General Manager Rapelje, *now dead* (R. p. 541), had with Mayor Cullen at Wibaux in 1922 (R. pp. 157 & 158). At this trial, Sutherland was willing to go stronger than he did at the trial of the Heckaman case, as he now testified that Rapelje said they were going "to give us a new bridge over Beaver Creek—a *longer* bridge" (R. p. 158).

In his testimony at the trial of the Heckaman case, Sutherland said that Rapelje "didn't mention no length * * * but we took it for granted he meant lengthwise" (R. p. 170). He also admitted that at this interview with Rapelje the only thing the Mayor wanted was an underpass through the embankment for school children and that some complaint was made about the center pier of the viaduct at Wibaux Street and of it being muddy under it (R. p. 168).

Testimony as to oral statements by persons, now dead, is subjected to the closest scrutiny and considered the weakest and least satisfactory of any evidence.

Escallier v. Great Northern Railway, 46 Mont. 238, 127 Pac. 458.

At the Heckaman trial, the defendant did not have Rapelje's written report to the President of the Company of this interview at Wibaux, made on April 9, 1922, *the day of the interview*, but the same was introduced in evidence at this trial (R. p. 541) as Defendant's Exhibit "J", and is set out at pages 543 to 545 of the Record. This report shows that the only things the committee wanted and the only matters discussed at that meeting were the viaduct or overhead bridge west of the depot and the underpass for school children west of that (R. p. 544).

Mayor Cullen's testimony as to what occurred at this meeting with Rapelje shows that the only things discussed were a concrete viaduct at Wibaux Street and an underpass for children (R. pp. 202 & 206). He testified that Rapelje said, "We expect to put that viaduct in but when we do so we intend to raise the track about four feet, but when we do that, you will see what will happen. We got to raise the track this way and that way",—that would be east and west along there, "or else it would make a 'bump'; you will have to grade way up there, and we will have to put in a new bridge or raise it." (R. p. 203).

Cullen also testified:

"Of course, if they raised the track easterly from the Wibaux Street viaduct or bridge as far as the stockyards, they would necessarily have to raise the bridge over Beaver creek, and that is what I understood Mr. Rapelje to mean." (R. p. 207).

Chief Engineer Blum and General Manager Sloan were also present at this interview and testified regarding the same (R. pp. 526-530 & 535). Their testimony corroborates Mayor Cul-

len and shows nothing was said about the bridge over Beaver Creek, except that raising the track four feet would also necessitate the expense of also raising the bridge to correspond.

ALLEGED LETTERS FROM TOWN COUNCIL OR CHAMBER
OF COMMERCE.

Plaintiff alleged in his complaint (R. p. 5) and attempted to show that in 1921 and 1922, letters from the Town Council or Chamber of Commerce were sent to the Superintendent of the defendant, notifying him that the railway bridge over Beaver Creek was insufficient. The evidence does not sustain any such contention.

Mr. White, plaintiff in a similar case, testified that as a result of informal conversations at council meetings, and of the commercial club he wrote a letter to Superintendent Sloan at Glendive, regarding "securing some opening that would relieve us from apparent, at least,—flood conditions" (R. pp. 109-110). Just what the nature of this complaint, if made, was is not shown in his testimony. Even if a letter had been received from someone not an engineer and qualified to give an opinion on bridges, it would be immaterial unless it gave some definite facts in support thereof.

Mr. Sloan was Superintendent at Glendive from November, 1920, to the spring of 1924 (R. p. 535). He testified:

"Q. Now, Mr. Sloan, you may tell the court and jury whether any time during the four years of your superintendency of the Yellowstone Division, you were asked either by letter, verbally, or in any manner,—whether you received any request from Wibaux or the people of Wibaux, the Mayor or the Council, or anybody connected with it, the Commercial Club, or anyone else, to lengthen, widen, alter, or in any manner change the bridge over Beaver Creek?

A. I did not receive any such request." (R. p. 536).

Plaintiff also attempted to show by Mr. Orgain that, pursuant to a minute entry of the Town Council on April 3, 1923, he wrote a letter to the Superintendent regarding a larger bridge over Beaver Creek (R. pp. 213-221). This minute entry was not admitted (R. p. 221).

Mr. Orgain admitted that he had no recollection of writing any such letter (R. p. 217).

Counsel for plaintiff announced that Mr. Orgain had repeatedly stated that he had no independent recollection of writing any such letter (R. p. 219).

Mr. Sloan denied ever receiving any such letter (R. p. 536).

Even if evidence that members of the chamber of commerce or town council thought the bridge was insufficient, and this showed negligence of the defendant, if brought to its attention and no action taken thereon (and we contend that if true it would not prove negligence), the plaintiff failed to prove that the town council or chamber of commerce had ever notified the defendant that its bridge over Beaver Creek was insufficient to handle the ordinary high waters in said stream.

As already shown under the heading "Interview with Rapelje", the interview between Mayor Cullen of Wibaux and the Secretary of the Commercial Club, and other citizens of the town of Wibaux and Mr. Rapelje, General Manager of the Railway Company, at Wibaux on April 9, 1922, the only matters referred to by the Mayor and others that they wanted changed or improved were the viaduct or underpass at Wibaux Street, and the construction of an underpass west thereof, for the safety of school children.

Mr. Cullen, a former mayor of Wibaux, called as a witness by the plaintiff, testified he made no complaint about the bridge over Beaver Creek, and heard no complaint from others (R. p. 207).

The testimony of Chief Engineer Blum (R. pp. 526-530), and General Manager Sloan (R. p. 535), who were present at this interview, and the report of Vice President Rapelje made to the President of the defendant railroad, which report was made the same day that the meeting at Wibaux took place, make it clear no complaint of any kind was made regarding the bridge over Beaver Creek. (Defendant's Exhibit "J", R. pp. 543-545).

It thus appears from the testimony regarding this interview that as late as April 9, 1922, and after the 1921 high water, the officials and people of Wibaux had no complaint or criticism to make regarding the bridge over Beaver Creek.

As heretofore shown under the headings "No evidence of Actionable Negligence" and "Proximate Cause and Concurring Negligence" the negligence, if any, of the defendant merely created a *condition* and was *not concurrent* with the act of God that caused the damage to plaintiff's property and we submit that the defense of an unprecedented flood was conclusively established and precludes a recovery in this action.

CONCLUSION.

For the reasons stated it is therefore most respectfully submitted that the judgment should be reversed.

FREDERIC D. McCARTHY,
of St. Paul, Minnesota,

JOHNSTON, COLEMAN & JAMESON,
of Billings, Montana,

GUNN, RASCH & HALL,
of Helena, Montana,
Attorneys for Appellant.

HILL

Cemetery

HILL

HILL



Statue of Pierre Wibaux

N.P.R.Y. MAIN TRACK

SCHOOL UNDER-PASS

ORGAIN AVE.

AVE. S.

CATHOLIC CHURCH

DDP FELLOW HALL

FIRST AVE.

CITY WATER TANK

(METHODIST) PARSONAGE CHURCH

GREEN HOUSE MRS. MATTIE MILLER

WIBAUX BLACKSMITH SHOP (DAILY)

WAGNER BECKMAN WIBAUX HOUSE

DEPOT

BRIDGE OVER WIBAUX ST.

COUNTY BRIDGE

RAILROAD BRIDGE

ELEVATOR

culvert

OSTBY

ALICE ST.

AVE.

House where Barclay went in 1921 (R.P. 127)

BUSHMAN

YOUNG

ST.

REGINA

Direction of High Water as testified by Massey (R.P. 142)

MASSEY HOUSE

Beaver Creek

Scale: 1" = 400'

N

Possum Hollow

HILL

HILL

